Fred Meyer Stores, Inc. *and* United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union. Case 36–CA–010555

December 13, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On December 8, 2010, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

The central issue presented is whether the Respondent unlawfully changed the parties' longstanding and contractually-based practice of allowing union representatives to have short conversations with employees on the selling floor. The parties' successive collective-bargaining agreements included the following visitation language:

> It is the desire of the Employer and the Union to avoid wherever possible, the loss of working time by employees covered by this Agreement. Therefore representatives of the Union when visiting the store or contacting employees on union business during their working hours shall first contract the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

During the significant period of time that the contractual access provision has been in place, the parties have established a past practice as to its interpretation and application. Specifically, as found by the judge, the parties have allowed union representatives to have conversations with employees on the selling floor so long as the following conditions were met: (1) the employees were not dealing with or assisting store customers at the time, and (2) the store floor conversations were kept to a reasonable length. The judge found that the parties' understanding was that a reasonable length for such conversations was "a minute or two or possibly longer depending on the circumstances." The judge found that the parties did not have a clearly defined practice with regard to the number of union agents permitted to be in a store at any one time.

The events at issue took place on October 15, 2009. By then, the Respondent and the Union had been engaged in multiemployer negotiations for a successor collective-bargaining agreement for more than a year. That day, the Union sent a team of eight representatives to the Respondent's Hillsboro, Oregon facility as part of a campaign to maintain employee support during the protracted negotiations; the representatives were instructed to inform employees about the status of the negotiations, distribute flyers, and solicit signatures for a petition in support of the Union's proposals.[2] When they arrived, pursuant to the visitation provision of the parties' collective-bargaining agreement, Union Representatives Jenny Reed and Brad Witt stopped at the store's information desk to inform the manager on duty (MOD) that they were in the store; meanwhile, the other six union representatives spread out in pairs to talk to employees.[3] After MOD Jim Dostert arrived at the information desk, he informed Reed and Witt that their contact with employees on the store floor would be limited to identification and introductions and that any additional communications would need to take place in the breakroom. Reed disagreed with Dostert's instructions, offering to show him a copy of the parties' contractual visitation policy. Dostert declined to read or consider the policy.[4]

[1] The Respondent has excepted to the some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The petition reads:

> As dedicated employees of Fred Meyer we are proud to provide a vital service to the communities we serve and the communities we live in. Our hard work and service contributes greatly to the financial success of Fred Meyer and the satisfaction of our customers. Now more than ever the economic security and health and well being of our families is of great importance.
>
> Respect is a two way street and we ask that Fred Meyer be a responsible corporate citizen and respect our needs as employees and the needs of our families.
>
> *We deserve better! Respect our work. Respect our families. Respect our need for affordable health care. Respect our need for a living wage and a secure retirement.* [Emphasis in original.]

[3] The record is silent on how many, if any, customers were in the store at the time. As discussed below, it is apparent that the store was not particularly busy.

[4] In adopting the judge's credibility resolutions, we note, as the judge did, that Reed's and Witt's testimony of what Dostert told them closely tracks Dostert's written report about the incident.

Thereafter, Reed and Witt attempted to speak with cashier Alicia England, who was straightening a nearby display. Dostert intervened, angrily instructing England not to talk to Reed. Dostert then made several disparaging remarks about the Union and summoned the store's security officer to evict Reed and Witt from the store. When Reed and Witt cited their contractual right to be on the premises and refused to leave, the Respondent contacted the police. Ultimately, the local police arrested Reed for trespass; that same day, two other union representatives were arrested for refusing to leave the parking lot.

The judge found that the Respondent committed several violations of the Act, including violating Section 8(a)(5) and (1) by limiting the union agents' right to contact store employees and violating Section 8(a)(1) by telling employees not to speak to the union representatives, disparaging the Union in the presence of employees, threatening to have union representatives arrested, and causing the arrest of three union representatives. For the reasons set forth in the judge's decision, we agree, and we adopt the judge's recommended Order in its entirety.

For the reasons set forth in his dissent, our colleague would reverse the judge and dismiss the complaint. We do not find his reasoning to be persuasive. To begin, our colleague criticizes the judge for not applying the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), to the instant facts. The first problem with that criticism, however, is that *Lechmere* is not on point here. Whereas *Lechmere* involved initial union organizing, the parties in the instant case not only had a visitation and access policy embodied in their collective-bargaining agreement but also had years of experience applying that access policy. As the Board has found, *Lechmere* is not applicable under such circumstances.[5] See *CDK Contracting Co.*, 308 NLRB 1117 (1992) (holding that general contractor cannot rely on *Lechmere* to deny access to union officials who sought to communicate with subcontractor's represented employees working at general contractor's site, where the visitation clause in the contract between the subcontractor and the union permitted access); accord: *Wolgast Corp.*, 334 NLRB 203 (2001), enfd. 349 F.3d 250 (6th Cir. 2003). The second problem with this criticism is that no party made this argument to the Board. The Respondent's brief in support of exceptions does not mention *Lechmere* or any related cases; instead, the Respondent argues that its actions on October 15 were justified as a result of the union representatives' failure to comply with the parties' established visitation practices.

Our colleague next asserts that the conditions imposed by Dostert on union representatives Reed and Witt—that they were not allowed to communicate with employees on the store floor other than to introduce themselves and to distribute business cards—constituted a de minimis change in the visitation practice and, therefore, did not violate Section 8(a)(5). We disagree. In our view, the elimination of the established right of the union representatives to have short, substantive discussions with employees on the sales floor constituted a significant limitation on the employees' Section 7 rights. See *Ernst Home Centers*, 308 NLRB 848, 848–849 (1992) (rejecting respondent's argument that unilaterally altering the established practice of permitting the union's agents to have limited conversations with employees on the sales floor was not a material change).

Our dissenting colleague would also find that the number of union representatives in the store on October 15 constituted an excessive departure from past practice. Because, in his view, the Union had abrogated its own duty to bargain, the Respondent could not have violated Section 8(a)(5). The parties' access provision, however, does not specify any limits on the number of union representatives who may visit the store at any one time. See generally *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992) (finding violation where respondent expelled union representatives from premises but respondent did not establish that any representative breached the parties' contractual access provision), enfd. sub nom. *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995). Further, Dostert's actions cannot be excused as a response to the Union's purported abrogation of its bargaining obligation because, at the time he limited the access rights of Witt and Reed, Dostert was not aware that any additional representatives were present at the store.

Finally, we disagree with our dissenting colleague's conclusion that the union representatives had "no independent statutory right to be on the Respondent's property to communicate with represented employees." Even absent the parties' access provision and their longstanding past practice, employees have a "right to proper representation" that could require allowing union agents access to the employer's property. See *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985). In light of the parties' contractual access provision(s) and their established past practice, we need not reach this broader issue. It is worth noting,

[5] Our dissenting colleague's reliance on *May Department Stores Co.*, 59 NLRB 976 (1944), is similarly unavailing. As with *Lechmere*, that case has no applicability where, as here, the parties have an established contractual right of visitation that allows union representatives to communicate with represented employees on the selling floor.

however, that any interference with the Respondent's property right resulting from the union representatives' visit on October 15 appears to have been limited. To begin, the Respondent had long permitted floor visits. Furthermore, there is no evidence that the presence of the eight union representatives caused any disruption of operations in the 165-acre facility. The union representatives arrived at about 9:30 a.m. on a weekday, when the store was not busy, and spread out to speak with employees. They did not move as a group within the store.[6] That England was straightening a display rather than attending to customers when Dostert prohibited her from speaking with Reed and Witt supports our inference that the visit occurred at an off-peak hour.[7]

In conclusion, for the reasons set forth in the judge's decision, we find that the Respondent's actions violated Section 8(a)(5) and (1) of the Act.

ORDER

The Respondent, Fred Meyer Stores, Inc., Hillsboro, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the judge's recommended Order.

MEMBER HAYES, dissenting.

On October 15, 2009,[1] nonemployee union agents sought access to represented employees on the selling floor of the Respondent's Hillsboro, Oregon store during working hours in numbers and for a purpose that the Respondent was under no statutory duty to permit. The Respondent's management first reacted in accord with the parties' established contractual practice by asking two of these agents to go to nonpublic breakrooms in order to speak with employees for more than a brief time without disrupting normal selling operations. Then, when those agents refused to leave, management legitimately directed security officers to eject them and summoned the police for assistance. Ultimately, three union agents were arrested while on the Respondent's property.

As will be discussed, the Union's actions on October 15 were in contravention of long-established contractual practices for access to the Respondent's employees and were otherwise not entitled to statutory protection. However, in a strange form of judicial alchemy, the judge has transformed actions by the Respondent in furtherance of legitimate property and production interests into a unilateral change violation of Section 8(a)(5) and other related unfair labor practices. My colleagues affirm the judge's analysis. Unlike them, I would reverse the judge.

I begin with a recitation of law that the judge apparently found no need to mention. Employers have a general right to bar nonemployee union agents from their property on a nondiscriminatory basis.[2] Even nonemployee union representatives of an employer's employees have no general statutory right of access to an employer's property to communicate with represented employees. Rather, the employer's property rights must yield only to the limited extent necessary "where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises."[3] Further, an employer may generally bar its own employees from distributing literature in working areas,[4] and a retail employer such as the Respondent may lawfully prohibit its own employees from soliciting other employees on the selling floor during working and nonworking time.[5] A fortiori, nonemployee union agents have no independent statutory right to engage in distribution of literature[6] and solicitation of working employees on the selling floor.

Of course, the parties in a bargaining relationship may establish through contract or past practice a right of access for union agents that exceeds what is otherwise statutorily required. An employer's failure to give the union notice and an opportunity to bargain before making a unilateral change in such an established access right violates Section 8(a)(5) of the Act.[7] Further, nonemployee union agents on an employer's premises for communica-

[6] The dissent's speculative assertion that the other six union agents "intended to engage in discussion that could last more than 2 minutes and have employees cease work for at least as long as necessary" is not persuasive. There is no evidence that the union agents actually engaged in any such protracted discussions.

[7] In his dissent, our colleague opines that evidence whether the agents' visit was disruptive of store operations is "irrelevant to the question of whether the agents' presence and activity were in accord with the contractual visitation practice." We respectfully disagree. The parties' access provision states that "[a]ll contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties." Therefore, the fact that there is no evidence that the agents' presence and activity at the Hillsboro store on October 15 either interfered with customers or unreasonably interrupted working employees is directly relevant to our analysis.

[1] All dates are in October 2009.

[2] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956).

[3] *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985); also see *Nestle Purina Petcare Co.*, 347 NLRB 891 (2006).

[4] *Stoddard-Quirk*, 138 NLRB 615 (1962).

[5] *May Department Stores Co.,* 59 NLRB 976 (1944), enfd. as modified, 154 F.2d 533 (8th Cir. 1946), cert. denied, 329 U.S. 725 (1946).

[6] "As a rule . . . an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." *Lechmere*, 502 U.S. at 533.

[7] E.g., *Granite City Steel Co.,* 167 NLRB 310, 315–316 (1967).

tions with represented employees *pursuant to a contractual access clause* are engaged in activities protected by Section 7 of the Act.[8]

In this case, the judge found both that the Respondent unlawfully unilaterally changed the established union access practice on October 15 and that two union agents were engaged in protected activity that day because they were on the Respondent's premises pursuant to that established practice. The judge is twice mistaken, and these errors infect his entire analysis of the issues.

The judge's definition of the Union's established right of access for many years of the parties' collective-bargaining relationship is essentially undisputed before us. Store visitation provisions in successive multiemployer contracts stated:

> It is the desire of the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

Consistent past practice clarified the meaning of what access was permitted as reasonable under this provision prior to the events that gave rise to this proceeding. Store visits usually involved one union agent. Occasionally, a second agent in training was present. The agent(s) would first check in with store management. Subsequent conversations with employees working on the selling floor were to be brief and should not involve customers. Flyers could be distributed during these encounters with the request that employees read them later. On-floor conversations should last a minute or two. More extended conversations should take place on an employee's nonworking time in breakrooms or nonworking areas.

In 2009, the Union and Respondent were engaged in protracted multiemployer bargaining for a successor agreement. Local union officials enlisted international union officials' assistance to rally employee support for the Union's position. With the assistance and encouragement of these officials, including International Representatives Jenny Reed and Joe Price, the presence and activity of union agents at the Respondent's stores increased. Reed repeatedly testified during her testimony that the purpose of her store visits was to meet with employees, educate them about the Union's bargaining position, give them flyers, and solicit them to sign a healthcare petition.

Store officials and union agents skirmished over these visitation issues. One such skirmish took place at the Respondent's Hillsboro store on October 14, when International Representative Price argued with Hillsboro Store Manager Gary Catalano. During this argument, according to Catalano's uncontroverted testimony, Price threatened to "bring 15 or 20 more people tomorrow and we just do our thing tomorrow."

At 9:30 the next morning, eight union agents simultaneously entered the Hillsboro store. Only two of them, Reed and Bradley Witt, went to check in with management. The others spread out in pairs to talk with employees on the selling floor and to solicit their signatures on the healthcare petition. Food Manager Jim Dostert was designated to act as the manager on duty at the store in Catalano's absence. He met Reed and Witt at the store's information desk. They identified themselves and stated they were there to visit and talk with employees. Reed had in her possession flyers which she intended to distribute and a copy of the healthcare petition. There is no evidence that Dostert was aware at this time of the presence of other agents in the store for the same purpose. Reed and Witt certainly did not inform him.

What transpired thereafter was the subject of conflicting testimony. Reed and Witt testified that Dostert immediately said they had to go to the breakroom, effectively precluding even brief discussion with employees on the selling floor. Dostert testified that he told the agents they had the right to talk with employees on the floor for a minute or two, but lengthier discussion would have to take place in the breakroom.

Whatever was said—I will return to that shortly—did not dissuade Reed and Witt from moving to the selling floor where they attempted to speak to cashier Alicia England, who was working on an apparel project at a checking station. Dostert followed them. England, who is hearing-impaired, testified that Reed said she had a right to speak to her and handed England a paper. England did not recall hearing Dostert say anything, but it is clear that he interrupted, told her not to speak to the union agents, and resumed the argument with them about the extent of permissible visitation with employees on the selling floor. At some point during this rolling argument, the trio moved away from England to a different area of the store, and at some point Dostert made disparaging remarks about the union agents and unions in gen-

[8] *Turtle Bay Resorts,* 355 NLRB 706 (2010), adopting in full the earlier set aside decision reported at 353 NLRB 1242, 1242 fn. 6, and 1273 (2009).

eral.[9] Ultimately, a security officer directed Witt and Reed to leave the store. They did not immediately do so, police officers summoned by Dostert arrived, and Reed was arrested. Thereafter, as the disputants moved out of the store into the Respondent's parking lot, the police arrested two other union agents for trespass.

The judge began his analysis of the legality of the Respondent's actions by "narrowing the issues." For him, the presence and conduct of union agents other than Witt and Reed in the Hillsboro store on October 15 was essentially irrelevant. Instead, he found controlling the questions whether those two union agents were visiting the store in accord with established contractual practice and whether Dostert impermissibly departed from that practice when dealing with them, seeking their ouster, and causing the arrests. In a rambling and convoluted analysis of conflicting testimony, the judge purported to credit the testimony of Witt and Reed over Dostert. To a certain extent, this is what he did. The judge credited Witt and Reed and found that they identified themselves in their initial encounter with Dostert, expressed a desire "to do no more than talk briefly" with represented employees on the selling floor, and did not claim the right to extended discussion. In fact, it appears the judge gave the agents' testimony more credit than due. It is correct that their testimony did not disclose a contemporaneous claim of the right to extended discussion—although it is manifest in the record that the Union claims such a right—but neither did they indicate the desire to speak only briefly with employees.

As to Dostert's response, the judge did not actually credit in full the union agents' testimony that Dostert preemptively denied them any access to employees on the selling floor. Instead, he found that Dostert told the two agents they had to "limit their conversations with employees on the store floor to identification and introductions only with all additional communication between agent and employee required to be off the floor in the breakroom." The judge acknowledged that Dostert may not have noticed or focused on "the critical distinction" between a visitation policy limiting on-floor discussion to identification and introductions and one which allows agents to talk with employees for a reasonable period of time, "perhaps one or two minutes depending on the circumstances."

Regardless of Dostert's possible misunderstanding of the correct statement and application of the visitation policy, the judge found that his limitation of floor discussion contravened the contractual practice, in violation of Section 8(a)(5) of the Act, and the rights of represented employees to communicate with their union agents, in violation of Section 8(a)(1) of the Act. He therefore found separate 8(a)(1) violations for all actions taken with respect to the ejection and arrest of union agents.

Contrary to the judge, I find that the credited version of Dostert's articulation and application of the visitation policy did not constitute an unlawful unilateral change. It is well established that not every change in a contractual access rule constitutes a breach of the bargaining obligation. The change imposed must be "material, substantial, and significant."[10] In my view, the difference between permitting a brief introductory discussion on the shop floor and a discussion of 1 to 2 minutes does not rise to this level, if, in fact, there is any practical difference at all. Under neither version would Reed be permitted the on-floor time to educate employees about the Union's bargaining position and to solicit them to read and sign a healthcare petition, which is exactly what Reed intended to do in her conversation with England and others. Accordingly, the 8(a)(5) allegation should be dismissed.[11]

There is, however, a broader and far more compelling basis for dismissing this allegation and all related 8(a)(1) allegations. The judge impermissibly divorced the presence and conduct of Witt and Reed from those union agents who accompanied them for the same visitation purposes on October 15. The entire group of eight agents was far in excess of the customary one or two per store visit. Six of the agents made no attempt to check in with management before contacting working employees during working time on the selling floor. All of them, including Witt and Reed, intended to engage in discussions that could last more than a minute or two, and to have employees cease work for at least as long as necessary to read and sign the Union's healthcare petition. All of these actions were in substantial contravention of the parties' established visitation practice as defined by the judge and not disputed before us. The Union sought to change this practice by bluster, not bargaining. Consequently, even if Dostert himself substantially varied from that same practice in dealing with Witt and Reed,

[9] Crediting a composite version of contemporaneous notes by Witt and the testimony of Reed, the judge found that Dostert variously said to them, in England's presence, that he was tired of union people, union reps were jerks, union dues were ridiculous, unions were outdated and ridiculous, they were only there for people's money, the members did not need a union, how much money had they stolen from members, and he did not believe in unions.

[10] E.g., *United Technologies Corp.*, 278 NLRB 306, 308 (1986).

[11] See *Peerless Food Products, Inc.,* 236 NLRB 161 (1978) (no bargaining violation because unilateral change in union representative's prior "virtually unlimited" access to employees in production areas, by eliminating conversations unrelated to contract matters, was not material, substantial, and insignificant).

and later with the other agents, he did so in response to the Union's own bad-faith abrogation of its bargaining obligation, and no 8(a)(5) violation can be found.[12]

Furthermore, even if Dostert's statement of the visitation practice somehow constituted an unlawful unilateral change, the union agents' right to be in the store or anywhere on the Respondent's premises turns on whether they, not the Respondent, were in compliance with the established practice. They clearly were not.[13] Thus, based on the legal principles set forth earlier in this opinion, in the absence of a legally sufficient contractual justification for access by the union representatives, they had no independent statutory right to be on the Respondent's property to communicate with represented employees. The Respondent had a right to exclude them from its private property and to seek the assistance of police authorities to have them removed when they refused to leave as requested.[14]

Based on the foregoing, I would reverse the judge and dismiss the 8(a)(5) unilateral change allegations and all related 8(a)(1) allegations.[15]

[12] See *Times Publishing Co.*, 72 NLRB 676, 683 (1947) ("a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found."

[13] In affirming the judge, my colleagues refer to evidence that allegedly suggests the presence of the union agents was not disruptive of store operations. Such evidence is irrelevant to the question whether the agents' presence and activity were in accord with the contractual visitation practice.

[14] The Acting General Counsel argues, and the judge apparently agrees, that Dostert did not know of the union agents' departure from established access practice, and in any event, did not order them to leave the store and allegedly cause their arrest for this reason. It is not the Respondent's burden to prove its knowledge that the union agents were not engaged in protected activity. To the contrary, it is the Acting General Counsel's burden to prove that the agents were engaged in protected activity, and he has failed to meet this burden.

[15] I note that the judge found Dostert's disparaging remarks in England's presence about unions and union agents to be in violation of Sec. 8(a)(1). I believe there is some reason to question the judge's finding that England heard these remarks, As previously mentioned, England is hearing-impaired and could not recall any remarks by Dostert. Moreover, Reed testified that Dostert actually made his remarks in the vicinity of an unidentified employee after the argument moved away from England into a different store area.

However, it is not necessary to contest the factual basis for the judge's finding. As stated in *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004), "[i]t is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, '[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).' *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). Rather, 'flip and intemperate' remarks that are mere expressions of personal opinion are protected by the free speech provisions of Section 8(c) of the Act. Id." The judge did not elaborate the basis for finding Dostert's remarks unlawful., but his citation to *Turtle Bay Resorts*, supra, indicates that the accompanying threat by Dostert to have union representatives removed or arrested was the critical factor. For reasons previously stated, I would not find that Dostert's threat was unlawful. I see no other basis for finding that Dostert's disparagement was unlawful.

John H. Fawley, Esq. and *Helena A. Fiorianti, Esq.,* for the General Counsel.

Richard J. Alli Jr. and *Jennifer A. Sabovik, Esqs. (Bullard, Smith, Jernstedt & Wilson),* of Portland, Oregon, for the Respondent.

John S. Bishop, Esq. (McKanna, Bishop, Joffe & Arms), of Portland, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in 3 weeks of trial in Portland, Oregon, over the period April through July 2010. Posthearing briefs were timely submitted on August 31, 2010.

The matter arose as follows. On October 15, 2009, the United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union (the Union or the Charging Party) filed a charge against Fred Meyer Stores, Inc. (the Employer or the Respondent) with Subregion 36 of the National Labor Relations Board (the Board) docketed as Case 36–CA–010555. Following an investigation, the Regional Director for Region 19 on January 29, 2010, issued a complaint and notice of hearing regarding the charge and, on April 27, 2010, amended the complaint. The Respondent filed timely answers to the complaint and amended complaint.

The amended complaint alleges in paragraph 9 that the Respondent on October 15, 2009, at its Hillsboro, Oregon store through its store Home Department Manager Jim Dostert:

(a) Directed employees not to speak with union representatives;

(b) Told union representatives that they could not speak to employees;

(c) Told union representatives that they must go to the employee breakroom in order to speak with employees;

(d) Disparaged the Union in the presence of employees by stating that:

> Union representatives are jerks;
> Unions are outdated and ridiculous;
> Union dues are ridiculous; and
> Union representatives and the Union are stupid;

(e) Threatened to have union representatives arrested or removed from the store because they would not restrict their conversations with employees to the employee breakroom; and

(f) Instructed Hillsboro store Loss Prevention Manager Michael Kline in the presence of employees to contact the police to have the union representatives arrested or removed from the store because they would not restrict their conversations with employees to the employee breakroom.

The complaint further alleges in paragraph 10 that the Respondent on October 15, 2009, at its Hillsboro, Oregon store through its Hillsboro store Home Department Manager Jim

Dostert and Hillsboro store Loss Prevention Manager Michael Kline caused the arrest of the union representatives because they refused to limit their conversations with employees to the employee breakroom. And the complaint alleges at paragraph 11 that since October 15, 2009, the Respondent caused the criminal prosecution of the union representatives because they refused to limit their conversations with employees to the employee breakroom.

The conduct alleged in complaint paragraphs 9, 10, and 11 is further alleged in complaint paragraph 15 to violate Section 8(a)(1) of the National Labor Relations Act (the Act).

The complaint further alleges in paragraph 13, that at the same place and time the store home department manager in limiting the union agents' right to contact represented store employees within the facility consistent with the parties' contract and past practice, unilaterally changed the terms and conditions of union-represented employees without notifying the Union, bargaining with the Union respecting the change or obtaining the Union's permission and, in so doing, the complaint alleges in paragraph 14 the Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent in its answer denies the noted allegations of the complaint. It alleges the union agents involved in the October 15, 2009 contretemps were not conforming to the uniformly applied rules and practices of the Respondent or of the contract concerning in-store union agent contact with represented employees and therefore the union agents did not have the right to remain at the Respondent's Hillsboro facility. The Respondent argues further that the union agents were properly asked to leave and some did not. Therefore, the Respondent argues, its actions in obtaining their removal and the Respondent's utilization of public authority to accomplish that removal were permissible under the Act. Further, the Respondent specifically denies that the Respondent's agents' application of the rules to the union agents at the Hillsboro store on October 15, 2009, was a change in the longstanding application of the rules and practices followed by the parties and it therefore argues no change in the employees' working conditions occurred and Section 8(a)(5) of the Act was not violated as alleged.

FINDINGS OF FACT

Upon the entire record herein including helpful briefs from each of the parties, I make the following findings of fact[1]

I. JURISDICTION

At all material times, the Respondent, a State of Ohio corporation, with an office and place of business in Hillsboro, Oregon, has been engaged in the retail grocery business. During the 12-month period preceding the initial issuance of the complaint, the Respondent enjoyed gross revenues in excess of $500,000, and during the same period purchased and received at its Hillsboro facility goods valued in excess of $50,000 directly from suppliers located outside the State of Oregon.[2]

Based on the above, there is no dispute and I find that the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The pleadings establish, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE COLLECTIVE-BARGAINING RELATIONSHIP

The Respondent is a company doing business throughout Oregon and in other States engaged in the retail sale of groceries and other products in many cases in "big box" facilities of several acres in size, offering groceries and a wide variety of other products under one roof. The Respondent has many facilities in the Portland, Oregon area including a 165,000 square foot grocery and other goods retail facility in Hillsboro, Oregon.

The Union is a labor organization representing food and commercial workers in the State of Oregon and portions of Washington including the representation of a large number of the Respondent's employees in the Portland, Oregon area.

At all relevant times, the Respondent has recognized the Union as the exclusive representative for purposes of collective bargaining of certain of its employees in various bargaining units (units). These units include the following units, each of which is alleged in the complaint and admitted in the answer to be a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and respecting which the Union is the employees' representative pursuant to Section 9(a) of the Act.

The Grocery, Produce, and Delicatessen (Grocery) Unit:

> All employees within the jurisdiction of United Food & Commercial Workers' Union Local 555, covered by the wage schedules and classifications listed herein (head clerk/head produce clerk, journey person clerk, apprentices, courtesy clerks, demonstrators, container clerks employed in the grocery, produce and delicatessen departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Combined Checkout (CCK) Unit:

> All employees employed in the Respondent's combination food/non-food check stand departments in all present and future combination food/non-food check stand departments in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Retail Meat Unit:

> All employees covered by the wage schedules and classifications listed herein (head meat cutter, journeyperson meat cutter, apprentices, journeyperson meat wrapper, lead person,

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] The Board has recently taken jurisdiction over the Respondent. See for example, *Fred Meyer Stores, Inc.*, 355 NLRB 541 (2010).

journeypersons employed in the retail meat, service counter/butcher block, and service fish departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Non-Food Unit:

All employees within the jurisdiction of United Food & Commercial Workers Union Local 555, covered by the wage schedules and classifications listed herein (general sales, store helper clerks, salvage, pharmacy tech A, lead clerks, PICs), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Respondent's Hillsboro store employees in each of the four above-described bargaining units are represented by the Union.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The applicable collective-bargaining agreements

The grocery and meat bargaining units are covered by multiemployer bargaining agreements negotiated by a multiemployer association, Allied Employers, on behalf of the Respondent, two other major grocery employers, and a few smaller employers. The nonfood and CCK units are represented in negotiations with the Union by the Respondent individually.

At all relevant times[3] the applicable Portland and Vicinity Grocery, Meat, and CCK contracts covering the represented employees in the units set forth above, including the represented employees at the Hillsboro store, contained a store-visitation clause that concerns store visits by union representatives in which they contact represented employees on union business during employees' working hours. The contracts, not with identical numbering, contain identical language in a general conditions clause subarticle entitled, "Store Visitation:"

> It is the desire of the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

The Grocery, Meat, and CCK contracts expired in July 2008, but were extended by written agreements to continue until the parties reached new agreements. Such new agreements were reached in early 2010. The contracts with the quoted language were therefore current and in effect during all of 2009. The parties stipulated that the same contract language and practices concerning the quoted language was applied to nonfood unit employees including at the Hillsboro facility at all relevant times. The quoted contract language thus covered all represented employees at the Hillsboro facility at all relevant times.

2. Store visitation[4]

The Respondent's facilities in which represented employees work are often large, stand-alone facilities with adjacent parking areas. The stores are open during normal retail hours and represented employees generally work in areas where retail customers are shopping for the goods on sale. Some employees at the Hillsboro facility and doubtless others of the Respondent's facilities in the Portland area also work at least part of the time in nonpublic areas engaged in such tasks as maintaining security, receiving and warehousing product, or preparing items for sale. There are also offices and a nonpublic meal or breakroom for store staff use at relevant times with the normal tables and chairs and vending machines, etc.

The Union at all relevant times has utilized a staff to make regular visits to the stores in which its represented employees are employed including the Respondent's Portland area facilities and the Hillsboro store. Such individual union agents have a number of stores assigned to them and they visit each on a regular basis. Beyond the contract language quoted above, at least through the events at issue, there have been no written policies or explanations of the policy promulgated and distributed by the Respondent or apparently reduced to writing in any formal manner.

Substantial testimony on the store visitation policy and its application in practice was offered by the parties. The consensus of the testimony on the visitation process suggested that the longstanding, typical or ordinary practice was for the individual assigned union agent to visit a store on his or her "route" during the store's business hours, enter the store, directly or indirectly identify himself or herself to the store manager or person in charge of the store, and then walk the areas of the store where represented employees might be found. Encountering represented employees on the floor; the union agent would identify him or herself to represented employees and then communicate with the employee for a reasonable period. By the quoted contract language, this process could occur in the public areas of the store, but it should not interrupt employee service to customers or unreasonably interrupt employees in their duties. Conversations or contacts between employees and union agents that could not be concluded on the shop floor consistent with these limitations could be deferred to a later meeting, a later phone call or electronic communication from the modern panoply of mobile communication options now at hand, or the meeting could be adjourned to the store breakroom.

The testimony on both sides respecting the visitation practice addressed the quantification of the reasonableness aspects of the visitation agreement. Thus all who addressed the issue agreed a brief or reasonable period of communication was permissible between a union agent and a represented employee and

[3] Testimony established that the contract visitation language has been present in the parties' contracts in unchanged form at least for the past almost 20 years and was carried forward, again in unchanged form, in the 2010 contracts.

[4] The "visitation" involved herein is only the in-store visitation of represented store employees by union agents. Union agent visits to store management officials or in attending store site meetings are not at issue.

an unreasonable period was not. Union Field Representative Mary Spicher was assigned the Hillsboro store in the months before the events in controversy and indicated she limited her shop floor conversations with represented employees to "a couple of minutes," with a lesser time for cashiers in place at their cashier stations. Hillsboro management officials, Hillsboro Store Manager Catalano and Home Department Manager Dostert, testified that it was permissible for a union agent to engage with represented employees on the store floor for a minute or two.

Mary Spicher testified to two encounters with Hillsboro Store Manager Gary Catalano respecting union visitation during her visits to the store, the first occurring in the spring or early summer of 2008. She testified:

> I was just about finished with my route work and talking to people and he came up to me and said, you know you can't talk to anybody except in the breakroom. I said, no. Under the contract and the National Labor Relations Act, I have the right to talk to people while they're on the floor, and I have it right here in the contract. And he said, no, you don't. You have to go to the breakroom. And I happen to not have the contract on me. I went out to the car and I got it. I brought it back in and I showed it to him, and he said he didn't care and he was going to call [Respondent's Regional Human Resources Representative] Terri Robinson. . . . I said fine. But I'm through for today anyway, and I walked out to the car and I called [Robinson] first. . . .
>
> I had told [Robinson]. I said, I was in the [Hillsboro] store and Mr. Catalano's telling me that I can't talk to anybody except in the breakroom, and that's not correct. And she said, I'll talk to him. I said, thank you.

A few months later, Spicher testified she was in the Hillsboro store and had a brief exchange with an employee. Leaving the area Spicher encountered Store Manager Catalano. She described the brief conversation:

> And I was headed around the corner, and Mr. Catalano came the other way, and he said, I saw you talking to Lance in the seafood, and I told you, you can't talk to people on the floor.
>
> Q. Did you respond?
>
> A. I said that if you saw me, you know I was there about 30 seconds.
>
> Q. Did he have any response to that?
>
> A. He walked off.

When she was finishing her in-store communication with represented employees, Catalano approached her and said: "You know you can't talk to anybody except in the breakroom."

Catalano did not testify respecting these specific conversations, but rather recalled: "There have been a couple of times where I've reminded the reps not to take up too much time of the employees or interrupt their job duties."

A separate aspect of the dispute regarding the visitation rules was whether or not there was a numeric limit to the number of union agents who could be in the store for such purposes at one time. The contract language is not specific as to the number of representatives permitted at any one time. The clause simply requires no interference with service to customers or unreasonable interruption of employee performance of duties. There is no doubt that union practice typically involved one agent at a time, with two agents occasionally performing their in store functions when one agent was training or introducing a newer agent to the facility.

The dispute regarding the practice extant at the time of the controversy at issue is discussed in detail infra.

B. The Events

1. Fall 2009

Negotiations for new Portland area contracts to replace those that expired in July 2008 had not concluded after over a year of bargaining and in 2009 the Union sought the help of its International who provided various assistance including that of International Representative Jenny Reed in July 2009. Part of the Union's efforts carried out from that time was a campaign to encourage and sustain unit employee support for the Union in bargaining. This campaign included a variety of aspects. Thus Reed testified:

> I've assisted with formulating the message on text messaging, on e-mails, on fliers. We've had member nights out, that I have participated in, to garner membership involvement in their Union. There's been open house[s]. We've gotten quotes and pictures from members about what their goals are on the contract. We've talked to members. We've developed talking points so that we can talk to members about what's important to them. I've had meetings, coffee, breakfast, small-group, large-group meetings with members in variety of stores and locations. I've had one-on-one meetings. And I've helped other staff have one-on-one meetings. We've done a variety of things. You know, petitions and community coalitions and there's been a variety of things. . . .

The union representatives who visited stores to talk to represented employees in their stores were encouraged to talk to employees about the negotiations and encourage support for the Union's bargaining efforts and did so.

By early fall 2009, the union efforts in these regards became more active and, in the face of decertification petitions filed in two of the Respondent's Oregon stores, the Union suspected the Respondent of seeking to undermine the Union and viewed the employers conduct generally with alarm and reviewed unfair labor practice procedures and possibilities.

The Union utilized the International representatives provided to it to train its own representative in visiting stores and encouraging employee support for the Union. The Union also began to use "delegations" of up to eight union agents to enter into a store in the September–October 2009 period. International Representative Jenny Reed testified:

> So, having a group that broke up into twos meant that we could go in and talk to every single member that was working, in a really quick manner, educate them on what was going on in bargaining, get them to sign the petition, get them a flier, if necessary, get in and get out of the store.

The Respondent's vice president of labor associate relations, Cynthia Thornton, testified:[5]

> Well, leading up to the fall of 2009 . . . in Portland, we started having more reps come into even the Portland stores, three or four reps at a time, and getting more confrontational in their interactions with our management teams.
>
> Q. Was this different than your prior experiences?
>
> A. Yes.
>
> Q. In what way?
>
> A. Well, in prior experience, we've had problems with the Union, with union visitation, it's been with one union rep, a union rep that will get angry, yell, use profanity, something like that, get into an argument, and we're dealing with one person. What was occurring was several union reps coming in at a time and not following protocol. They either wouldn't check in or they'd keep talking to employees at length. When management would ask them to go to lunchroom, they would be confrontational with them.

The Respondent did not issue announcements of any kind related to visitation to its stores, file grievances, or file unfair labor practices respecting visitation issues. When store managers contacted the centralized labor relations staff, the visitation language and the practices described above were simply reiterated. The Union clearly perceived some type of resistance from the Respondent's store managers regarding visitations during this period because the Union contacted its agents by memo on the afternoon of October 13, 2009:

> We need information concerning any incidents at Fred Meyer where Management has tried to restrict our access to Union members. This would include being restricted to the breakroom, told not to talk to members on the sales floor, being told there was a time limit on how long we could talk to our members, being told we couldn't talk to members on the sales floor, being told there was a time limit on how long we cold talk to members, being told we couldn't hand out fliers or petitions, anything of this sort. We need this information jurisdiction wide.

2. October 14, 2009

As a result of a bargaining session cancellation of bargaining scheduled for October 14 and 15, 2009, the union representatives who had intended to be involved in the bargaining had time available and the Union conducted training of agents and members for store visitation on October 14. Reed testified:

> We provided substantial training, gave everybody an update about what hadn't happened, where we were at on healthcare because that was a big issue that we were bargaining on, and then how they were going to go talk to their coworkers in the store, make sure that they check in, talk to folks about what was going on, and what the next steps were going to be. It was really an education component to make sure that the members were fully aware of what was going on at the bargaining table. . . . It was a mutual training with all of the reps and the members that were in attendance.

Following the training the attendees were split into teams and assigned stores to visit. Reed testified:

> We had eight other teams besides the one I was on that were going to go out to the different stores and visit with their coworkers about what was happening at the bargaining table and work on helping get the petition signed to send the message to management that they were serious about getting a fair contract.

Mary Spicher at that time had been a union agent for 2 years and earlier had been an employee of the Respondent for over 30 years. At the time of the events in controversy Spicher was the union agent assigned to visit the Hillsboro store. She and Joe Price, an International representative based in Georgia who had been assigned to the Charging Party, were assigned to the Hillsboro store to talk to represented employees and to get a petition supportive of the Union's position on healthcare signed by those employees.

Spicher and Price visited the Hillsboro store the morning of October 14 for about an hour. Spicher testified that the two followed normal practice. During their Hillsboro store visit the two separated and individually spoke to represented employees and asked them to sign a petition respecting health care supportive of the Union's position in negotiations. Working independently, Spicher was called on her mobile phone by Price who told her "there was a young member on the pop aisle that had insurance questions, and he didn't have the answer. Could I please come over there and take care of it?" Spicher came over and the employee, who was unloading a pallet of beverages in a store isle, spoke to her about an insurance matter with Price standing in the area. While the employee started to stop working, Spicher told him to keep working, "You can work. We can listen." At that point, Spicher testified Store Food Manager Josh Sclch,[6] came up, spoke to Price and the two walked off through plastic doors into the back room. Spicher concluded talking to the employee and Price came out of the back and the two headed to a different area of the store. Neither Price nor Scich testified.

Spicher testified as to what happened next:

> And at that point, Mr. Catalano came up to us, looking very angry. And he said, I told you, you have to talk to people in the breakroom. And before I could open my mouth to respond, Mr. Price got right in front of him and they were nose-to-nose pretty much arguing.
>
> Q. And do you recall what was said?

[5] She also testified to issues arising in the context of the two decertification petitions and efforts of the Union at the stores involved in Coos Bay and Bend, Oregon, geographic locations not included the bargaining units involved herein.

[6] Sclch's name was subject to variant spellings in the record. The spelling of his name used above is that appearing in the record testimony of his Store Manager Catalano. Scich did not testify. The purported citations to his testimony in the Respondent's brief are the testimony of others misattributed to Sclch. Price did not testify either. Thus, there was no record nonhearsay evidence of the substance of the Sclch-Price exchanges occurring on October 14.

> A. That he said we couldn't be on the floor. Mr. Price said we could. He said, no, you can't. And, who are you? He told him who he was. And he tried to say—Mr. Catalano tried to say something else. Mr. Price cut him off and he said, we're done here, I didn't cut you off and you won't let me speak. And so he went his way and we left the store.

Spicher also recalled that she also told Catalano before the exchange between Price and Catalano that the union agents had a right to be on the floor.

Store Manager Catalano testified that during the visit of the union representatives on October 14, his food manager, Josh Sclch, reported to him that he had a heated "run-in" with a union representative concerning a matter, Catalano testified he was not exactly sure what the situation had been as reported by Sclch, but it involved the union representative and an employee. Catalano testified he came across the two union representatives thereafter and had a conversation with the male who was otherwise unknown to him. He did not recognize Spicher as the union agent who was assigned to and had regularly visited his store and its represented employees. Catalano testified the conversation was heated. Catalano "reiterated the policy, that they are not to be on the sales floor, to interrupt our customers, to interrupt our job duties of the associates, and that if they needed more time they needed to set up in the lunchroom." He added: "I was just trying to get out the policy and let him know that the lunchroom was available to them." Catalano characterized the male union representative's responses as interrupting and angry and that the union agent added:

> [W]ell, what if I just bring in 15 or 20 more people tomorrow and we just do our thing tomorrow, and I'm not sure exactly what he said there, but something along those words of bringing in a whole group of people.

Thereafter that same day Catalano reported these events, including the possibility of 15 or 20 union agents entering the store, by telephone to Terry Robinson in the Respondent's regional human resources office. He testified to that conversation with Robinson:

> I don't recall my exact words, something along the lines of basically just what I said, what had happened, and let her know that they were, you know, promising to bring in a whole bunch of people the next day and asking for her advice on what we should do.
>
> Q. Okay. And what did she tell you?
>
> A. She said she'd have to call Cindy Thornton and then get back to me, so when she did get back to me it was a step by step procedure of making sure to contact the office if they did show up to get advice on how to handle it, but we were basically to reiterate our policy, allow them to be in the store as long as they weren't disruptive, and if they were becoming disruptive we were to ask them to leave. If they refused, then we were to get the loss prevention manager on the sales floor so he could handle the situation, ask them to leave, but keep in contact with either Terry or Cindy during the whole time, and if they still wouldn't leave on the advice of either Terry or Cindy we were to call the police.

Catalano also testified that Robinson at no time or indeed anyone from Respondent's higher management had ever told him that there was a limit to the number of union representatives that could be in the store at one time or that they should be limited to one or two at any one time. Robinson did not testify at the hearing.

Thereafter that same day, Catalano testified he had a meeting with his Hillsboro store division managers, including Dostert, the food manager, "to let them know what I was told and what the procedure would be if that, indeed, happened the next day, and if this group showed up this was what we were going to do." He testified:

> I went through the steps, advised them of what we want from the union reps, no disruption. If they needed—you know, if they weren't going to obey simply our common practice[7] to set up in the lunchroom, then we needed to ask them to leave. If they didn't want to leave, refused to leave, at that point it may have been necessary to call the police.

Catalano knew that he was not going to be at the store the morning of October 15, 2009. In his absence, consistent with normal store practice, a "Manager on Duty" or "MOD" would have been designated either on October 14 or the morning of the 15. In the event Food Manager Dostert was designated and acted as MOD on October 15.

Price and Spicher upon leaving the store after the events described above returned to the union offices and, in the course of the evening during the training sessions that were ongoing, reported the events that had taken place at the Hillsboro store. During the evening store visit training sessions, the decision was taken, as part of the plan to visit many of the Respondent's stores with teams of agents, to send eight agents to visit the Hillsboro store the morning of the following day, October 15, 2009. The designated union agents were: Jenny Reed, Brad Witt, Mike Marshall, Ken Spray, Jeff Anderson, Kevin Billman, Kathy Macinnis, and Joe Price. Because the union agents as part of a general cautionary practice anticipated there was a possibility the Respondent would seek the arrest of a union

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[7] Catalano testified initially to his understanding of the Respondent's visitation policy:

> They check in at the desk or with whoever the manager on duty is. They're allowed to walk the store, make sure the employees know that they're in the store and available to discuss anything they have, and then we ask them to—if they need longer conversations to set up in the lunchroom so the employees either on their break or their lunch will have the opportunity to talk with them.

In answer to followup questions he expanded on the policy:

> Q. And is there any limit on the amount of time a union rep is allowed to talk to an employee who's working?
>
> A. We ask that they keep their conversations brief and not interrupt their job duties or not interrupt their interaction with customers.
>
> Q. Okay. And if they need to have longer conversations with the union reps, then what does the employee do?
>
> A. They're allowed to talk to them on—again, on their break or on their lunch hour. . . .

agent or agents, it was determined that Jenny Reed, as an International Representative, would "take" such an arrest if necessary.

3. October 15, 2009

The eight union agents assigned the previous evening to visit the Hillsboro store gathered at the Union's Portland office on the morning of Thursday, October 15, 2009, and carpooled to the store arriving at around 9:30 a.m. One of the eight, at that time the Union's special assistant to the union president, Bradley Witt, was also an Oregon State representative in the Oregon House of Representatives for District 31. Among his duties as special assistant to the president was to supervise and direct the union agents that visited represented stores.

Witt testified that as he was driving from the union office to the Hillsboro store that morning, he telephoned Donna Nyberg, who at that time was both Witt's campaign manager and a freelance photographer. He noted: "I felt that there was a potential story there. She has credentials for the labor press. And I, frankly, was hopeful that she might be able to get a story." Witt continued that although he had initiated the telephone call on his own motion and without consulting or informing anyone, he placed the call, reached Nyberg, and informed her of the upcoming visit of the union agents at the Hillsboro store of the Respondent. She ultimately came to the store soon after the union agents arrived, entered the store, and took photographs of the subsequent events there as matters developed. Certain of her photographs were entered into evidence. Nyberg did not testify.

Upon arriving at the store parking lot and parking the vehicles in that lot, the union agents entered the store. Reed and Witt took the lead role. The other six simply entered the store and dispersed in pairs to talk to represented employees. Jenny Reed and Bradley Witt entered the store by its main entrance and approached the store's customer information desk[8] which was staffed by a customer service representative. Witt testified he presented his business card to the representative and asked to speak to a manager. After approximately 5 minutes, Dostert, at that time acting as manager on duty, in charge of the store, arrived at the information desk. The two union agents identified themselves and indicated they were in the store to talk to their represented employees. Witness versions of subsequent events that day differed.

[8] The witnesses used the terms customer service desk and customer information desk seemingly interchangeably.

C. Versions of Events[9]

1. The Hillsboro events to the arrests

a. The testimony of Reed[10]

Reed testified that she entered the store carrying union fliers, a petition concerning health care she intended to offer to represented employees for signature and a sheet setting forth the then current visitation language of the applicable collective-bargaining agreements. After informing the customer information employee they wished to talk to the store manager, they waited until Jim Dostert arrived. Reed and Witt introduced themselves and, in Reed's recollection, they told Dostert they were "here in the store to do a visit and talk with members." Without further conversation by any of the three, Dostert, in Reed's testimony, simply replied without more: "We needed to go to the breakroom." Reed testified as to what happened next:

> We had a copy of the store visitation language and handed it to Mr. Dostert. And explained we had a contract that was in effect that allowed us to be there and that we needed to talk to the members, educate the members about what was going on.
>
> Q. And did Manager Dostert respond when you showed him the contract's access provisions for visitation—
>
> A. He did.
>
> Q. —permission? And what do you recall him saying?
>
> A. He said that he did not need to follow that.
>
> Q. Was there any further conversation that you heard at the customer information desk that morning?
>
> A. There was some conversation back and forth, but I can't—because it was kind of the heat of the moment, and he said he wanted us to go to the breakroom. He wanted us to leave. At which point, you know, tried to hand him the contract language again. He wouldn't take it. And he then picked up the phone to call Cindy Thornton.

Reed recalled that she and Witt waited in place for a few minutes while Dostert spoke on his mobile phone. At that point, Dostert looked at her and said: "[H]e did not like my face . . . ." at which point Reed and Witt walked away toward store employees in the store's apparel section including store employee Alicia England who was standing in an apparel department check stand. Reed and Witt approached England and Reed started to talk to her about bargaining. Reed testified as to what occurred next:

[9] The instant case was closely litigated. In the interest of avoiding making a long decision even longer, the recitation of testimony noted is not the entirety of any given witnesses complete testimony. Nor are all witnesses named or their evidence discussed. All evidence has however been considered based on the record as a whole and in the context of the credibility and demeanor of all witnesses.

[10] Reed was designated as essential to the presentation of the Charging Party's case and therefore was exempt from the sequestration order issued at the commencement of the hearing which required witness separation from the hearing room during the testimony of others. She was present essentially throughout the proceedings.

Q. Did you have any interaction with Alicia [England] at the check stand?

A. I attempted to have some interaction with her.

Q. Okay.

A. I attempted to be able to talk to her about what was going on with bargaining and how it would affect her.

Q. Okay. Well, what happened as you attempted to speak to her?

A. Manager Dostert interjected from the left-hand side, yelling to her, you can't talk to her, and then to me, you can't talk to her, and back and forth, you can't talk to her. You can't talk to them.

Q. And did you happen to notice Manager Dostert's physical appearance at this point?

A. Yeah. He was clearly angry. His face was red. His voice was raised. His hands were clenched. He was clearly upset.

The trio: Dostert, Reed, and Witt, moved into a different area with Dostert in some anger. Reed testified:

Q. Okay. So, you testified that Mr. Dostert said something at this point. Do you recall what he said?

A. He said a lot, including that we were only here for people's dues money, that people—these members did not need a union. He asked me how much money we'd stolen from these members. That he didn't believe in unions, that we didn't need unions, and he wanted us to leave. He was—there was a lot of conversation that was happening and he was pretty agitated.

Reed testified she responded to these statements with assertions that:

[W]e were there to talk to members about what was going on with their contract. And that I had an obligation to be there, that I wasn't there to pick a fight with him. That—my—it's my job to represent the members and that that's what I was there to do.

While the three were in the periphery of the jewelry or photo/electronics area, they were joined by Respondent's store security agent Kurt Klein who told the two union agents that Dostert wanted them to leave. The two declined to do so asserting a contractual right to remain. In time three uniformed police officers entered the store and approached. Dostert told the officers, identifying the two Union Agents Reed and Witt, in Reed's memory, that "he wanted us to leave, he wanted us out of there."

One officer approached the two union agents more closely. They again asserted their contractual rights to remain in the store and meet with represented employees. Reed recalled she told the officer: "I had a contractual right and obligation to be there." The officer simply replied that Manager Dostert wanted the two to leave. Reed testified to what happened next:

I asked what would happen if I couldn't leave, because I had an obligation to be there.

Q. And did you get a response?

A. That he would have to arrest me.

Q. Did the officers offer you any option other than arrest if you chose to remain in the store?

A. No. I tried to have dialogue with them, and there was no conversation that could be had.

Q. Okay. And perhaps this is self-evident but how did you know that you were under arrest?

A. They put handcuffs on me.

Q. Did they tell you why they were handcuffing you?

A. They did.

Q. And what did they say?

A. They were arresting me for trespass.

Q. While you were being arrested, and right before that, did you happen to notice whether there were any employees present in the immediate area?

A. There were.

Q. And do you recall approximately how many?

A. I would say there were 5 to 10.

Reed was then taken by the police from the store to the store parking lot and there placed in a patrol car in which after about half an hour she was taken to jail, booked, incarcerated, and later released on bail. Witt did not refuse to leave the store during this encounter with the police but rather, while Reed was being removed from the store, contacted the other union agents in the store and they all exited the facility.

From her vantage point in the patrol car, Reed was able to observe events from the parking lot. She described a scene of confusion, union agents and customers trying to leave the store, respondent managers "kind of standing in the way," police officers standing at the door. She testified she observed the union agents leaving the store, heading to their cars and leaving the area save for Union Collective-Bargaining Representative Mike Marshall who was stopped, arrested next to a car in the parking lot by police officers there, handcuffed and in turn taken to jail, booked, incarcerated, and later released on bail.

b. The testimony of Witt

Bradley Witt testified that he and Reed introduced themselves to Dostert as representatives of the Charging Party and no further discussion occurred regarding who they represented. Further he testified that Dostert did not in his initial conversation with them nor at any other time suggest they could meet with represented employees in any location other than in the breakroom and, after the union agents asserted their contractual rights to talk to the represented employees on the floor, Dostert was specific in asserting "he would have us trespassed if we attempted to meet with our members on the floor, that he would do it gladly, and that he had heard all that crap about Union rights before." Witt also testified that Dostert told them: "[T]hat union dues are ridiculous, that unions are outdated and ridiculous."

Witt corroborated Reed's testimony respecting their contact with store cashier employee Alice England. He recalled that the first of the three of them to speak to England was Dostert who told her not to speak to Reed or Witt. Witt also recalled Dostert asserting in the check stand area in the presence of store employees: "I'm tired of these union people, union reps are jerks; I'm going to call loss control and have the Union representatives removed from the store."

Witt testified the three—Dostert, Reed, and Witt—then moved to the perimeter of the jewelry area where he observed Dostert take out his portable phone and initiate a call stating he wished to talk to Cindy Thornton. Witt could not hear the conversation.

After Dostert completed his telephone call, Witt testified:

> Mr. Dostert said that union dues are ridiculous, that unions are outdated and ridiculous, and then he said to Ms. Reed that, you are not anyone to me and you cannot strong-arm people.
>
> Q. What was Mr. Dostert's physical appearance as he was saying this?
>
> A. He was agitated.
>
> Q. What was the color of his face?
>
> A. Flushed.
>
> Q. Tone of his voice?
>
> A. Showing contempt.

Witt approached Dostert to respond to these remarks but at that time a male store security officer, Kline, arrived and instructed Witt not to approach Dostert "and that if I did, he would have—he, the store security, would have me handcuffed." Dostert walked into another area briefly, returned and, Witt testified, "He came right up to me, into my personal space. He got in my face. And he said that, you are all jerks and that all you do is waste time and money."

Within perhaps 10 minutes uniformed police officers arrived at the store. Two officers approached Dostert, Reed, and Witt and others who were in the general area. One asked Dostert if he wanted the officers to "have us removed from the store." Dostert said yes. Witt and Reed then commenced to show the officers the contract language which they asserted gave them the right to be in the store. Witt recalled one officer simply said:

> . . . if there was one more word out of me, meaning me, that I would be arrested.
>
> Q. Did he state what he would do if you didn't leave?
>
> A. Subsequently, yes.
>
> Q. What did he say subsequently?
>
> A. Get out of the store, this is private property, get out now or you will be arrested.
>
> Q. And after he directed you to leave the store, what did you do?
>
> A. I began to leave the store.

Witt observed that Reed did not agree to leave and was handcuffed and taken to a police car by the officers and taken away. Witt and the other union agents walked out of the store through the entrances to the parking lot.

Witt testified: "[I] was engaged in the events that were transpiring with Mr. Dostert, and I was attempting to write them all down as they occurred." Several pages of what Whit identified as his verbatim, if abbreviated, notes on the events and statements made during the visit were received into evidence. Exemplars of these contemporary notes include the following excerpts of remarks of Dostert from Witt's chronological recitation of assertions:

> "Cannot talk to ees on the sales floor."
>
> "I'm tired of these union people. Union reps: jerks."
>
> "Union dues are ridiculous."
>
> "Unions are outdated and ridiculous."
>
> "You're not anyone to me."
>
> "You can't strong-arm people."

The Respondents Hillsboro store cashier Alicia England testified respecting her experience on October 15, 2009. On that date she was working in her usual role as a cashier at the apparel check stand in the Hillsboro store. She described the store as not very busy that morning and that she was working on an apparel department project at a check stand, the specifics of which task she could not recall. At that point Union Agent Reed and store Home Manager Dostert, approached her work location at the same time—an unusual circumstance which she found unsettling.

England recalled that when Union Representative Reed approached her. "She said, 'I have the right to speak to you, I'm from the Union' and she handed me a paper with something on it that was going on with the Union at that time." She testified Dostert was standing right next to Reed, but she could not recall if the home manager said anything to her.[11]

c. The testimony of Dostert[12]

James Dostert, at the time of the events in controversy, had been the Respondent's Hillsboro store home department manager for 2 months but had been in Respondent's management at various stores for over a dozen years. His initial experience with union agents and the Respondent's visitation policies arose in another store in circumstances where the Union was trying to organize unorganized employees in the store.

Dostert testified he did not have any role in, nor direct knowledge of, any of the events of October 14, 2009, at the store other than to have attended a meeting on that day in which Store Manager Gary Catalano reported to store managers that he "had a conflict with a couple Union representatives earlier that day," a "little issue with some visitation." He recalled Catalano:

> [J]ust reiterated that they have the right to walk the floor after they check in, interact with the employees, socialize for a minute or two, hand out their business card, and then anything lengthier needs to go to the breakroom.

In the early morning the following day, October 15, 2009, Dostert was informed by Catalano that he was leaving to attend a offsite meeting and that Dostert would serve during Castalano's absence as the manager on duty (MOD), i.e., the person

[11] England is hearing impaired and wears a hearing aid which does not provide complete restoration of hearing so that England augments her hearing with lip reading.

[12] Dostert, like Reed, was designated at trial by a party as essential to the presentation of that party's cause and therefore was exempt from separation from the hearing room during the testimony of others. He was in fact present during the entirety of the General Counsel's case in chief and began the testimony referred to herein on the 9th day of the 12-day hearing.

in charge of the facility. Before 10 a.m. that morning, Dostert received a telephone summons from the customer service desk employee saying two union representatives were there and wanted to check in with Dostert as MOD. Dostert walked through a portion of the store to reach the customer service desk. In doing so he did not observe any union agents in the store till he saw two at the customer service desk.

Dostert recalled:[13]

> I proceeded to the desk and walked up and saw two Union representatives, a male and a female. I walked up and introduced myself; the male known as Brad Witt and I shook hands. He handed me his card.
>
> Q. Had you seen these two individuals before?
>
> A. No, I had not. I said, you guys know the drill, that you have a right to walk the floor, engage with associates for a minute or two, hand out your card; anything lengthier than that needs to go to the breakroom.

At that point he testified that Reed held up a piece of paper and said that: "she had federal law rights to talk to the associates as long as she wanted to." Dostert responded:

> I, again, reiterated the policy. I said no, that policy states that you can walk the floor, engage with associates for a minute or two, socialize, hand out your card; anything lengthier needed to be taken to the breakroom.

Dostert testified that the three: he, Reed, and Witt did not resolve their heated disagreement regarding the permissible actions of union agents on the store floor. Dostert testified that Reed's assertion of her rights were not consistent with his understanding of store policy. Thus he testified:

> Q. Was there anything about the way she described the union rights that you found contrary to Fred Meyer policy?
>
> A. Yes, that she could talk as long as she wanted.

When the matter could not be resolved, Dostert telephoned Respondent's vice president of labor and associate relations, Cindy Thornton. Thornton testified respecting this first telephone call with Dostert.

> He called to say that he was having problems with the union reps, that they were refusing to follow our protocol, and were waving a piece of paper in his face about this is Federal law, and that they had a right to spend as much time with employees as they liked, and so he was calling me to ask if things had changed, and I said, no, they had not changed.
>
> Q. Did you describe the policy to him at that time?
>
> A. I went over it. I said it's the normal policy. They can walk the floor. They can spend a few minutes with the employees on the floor but ask them to carry on their longer conversations in the lunchroom. I said just reiterate the practice to them and ask them to comply.

Respecting the attributions of Witt and Reed that he made various derogatory statements respecting the Union and or union representatives, Dostert generally denied making the remarks. While he admitted calling Witt a jerk, he denied calling union representatives generally jerks. While admitting to holding opinions consistent with the words attributed to him, he denied stating the Union or unions are ridiculous or outdated. In certain cases, such as the allegation he called Reed stupid or ridiculous, he suggested that he simply called the sheet of paper she repeatedly proffered to him ridiculous.

Dostert described subsequent events and the interchange with employee Alice England:

> I start drifting again down towards apparel. I figured maybe if I went towards the doors, the exit, I could minimize the situation. Ms. Reed said she had the right to talk to employees as long as she wanted and walked briskly towards the apparel check stand where there was an employee standing. She said I'm going to talk to this employee right here.
>
> Q. What did you do next?
>
> A. I followed her over. Ms. Reed got the attention, the cashier's back was to her, but she turned around and stopped what she was doing to try to talk to her. I did tell the associate not to talk to her, that she was busy and she needed to keep doing what she was doing.
>
> Q. What was the associate doing, do you know?
>
> A. A project of some type. I'm not sure.

When Reed's interactions with England were thwarted: "I think the cashier was kind of confused about the whole situation, so Ms. Reed kind of gave up on talking to her," the three—Dostert, Reed, and Witt—drifted to another area within the store without resolution of their differing positions. Witt and Dostert had a "small conversation" regarding the Union's purpose in talking to employees, the virtues of the Union's positions and Dostert's general disagreement with the Union's position.

Dostert testified that during the entire time of the dispute and the incident with England, neither Reed nor Witt attempted to talk to other employees nor did they leave him and go to other parts of the store in an effort to talk to employees. From this point on, however, Dostert observed and received in store reports that other union representatives were talking to employees and trying to get them to sign a petition. Dostert called Thornton a second time:

> I called Cindy back, let her know that the situation was not going to resolve itself and what should I do next. She told me to call the loss prevention manager, have him come out and help me by explaining the trespass rules, and ask them to leave.

Thornton testified:

[13] In Dostert's October 15, 2009 report to higher management of that days events he recalled these same opening remarks as follows:

> I shook hands introducing myself as the MOD. I informed Brad Witt and female rep what I was told on Wednesday (14th) that they could approach associates and hold out their card and they would be in the breakroom for further information. They proceeded to pull out a piece of paper with a Supposed federal law/union contact saying they can talk to the associates which they are working that I would be violating federal law if I did not let Them.

> [Dostert] called back again and said that they were still refusing to comply, telling him that he was in violation of Federal law, and that there were more union reps there and was asking what he should do.
>
> Q. When you say more union reps, what did that mean to you?
>
> A. Well, he said there were multiple union reps there. He wasn't quite sure, and I can't remember the number.
>
> Q. Was it more than one?
>
> A. Yes.
>
> Q. What did you advise him during this conversation?
>
> A. I told him to again reiterate our policy, just ask them to comply with the policy, that if they didn't comply with the policy, to ask them to leave.

The Respondent's store security agent arrived, Dostert testified that "he proceeded to explain to Witt and Reed the trespass rules and asked them to leave." Dostert described what happened next:

> And then I did receive a phone call from Terri Robinson, our regional HR director, and I was on the phone and I was saying—that she was asking me what was going on. And I said, well, the Union representatives think they can talk to associates as long as they want. And that's when Mr. Witt proceeded to get in my, right next to my face and yell "liar" over the phone. And I stepped back a few feet. He proceeded to follow me and kept reiterating "liar," yelling it. I again stepped back, telling him that I'm trying to have a conversation, back off. And he proceeded not to. So, then, I stepped back again, and I asked Mr. Kline to step in between us so I could actually finish my phone call.
>
> Q. When he was calling you a liar, was that in a normal tone of voice?
>
> A. No, he was yelling.
>
> Q. How long did your conversation with Terri Robinson last?
>
> A. Thirty seconds, maybe.
>
> Q. What happened next?
>
> A. Mr. Kline was out there then and, you know, he was again reiterating that they needed to leave or they will be trespassing.

Dostert again telephoned Cindy Thornton. "I just explained to her, it was real brief, that it was out of control. What do you want me to do? And she said go ahead and call the police." Thornton described the call:

> [Dostert] called back again and said they were refusing to comply, and wanted to know what to do. I said, well, if they're not going to comply, you can ask them to leave, to contact the loss prevention manager and he'd have to contact the police to ask them to leave.

Dostert then directed Kline to call the police and he did so. After the police arrived, the union agents were asked to leave, Reed refused to leave but the other union agents left the store. Reed was arrested by the police and taken to a police car.

d. The mid-event telephone call between Thornton and Barkeley

We live in a world where seemingly every individual has and uses mobile communication devices. Through the calls noted above and through other calls not specifically set forth herein, the participants to the events of October 15 to a large degree kept their principals informed of ongoing developments.

During the events, the Union's International Union's vice president, Shaun Barkeley, telephoned Thornton. Thornton described her conversation with Barkeley:

> He called and said to me, I understand that you are ordering the union reps out of the store at Hillsboro, and calling the police to have them arrested. And I said, we have multiple union reps at the store and they're being disruptive, and we've asked them to leave. He said that he had sent those union reps in there and I asked him why he sent so many union reps in there, and he said because of something that had happened the day before, and I said, if something had happened the day before, why didn't you just call and talk about it, and he said that the union reps had a right to be there and this is how he handled things, and I said, well, they weren't there just servicing the store. They're being disruptive and he said he had trained the union reps and that they were trained to not interfere with their work, and that they could talk to the employees as long as they wanted, as long as they didn't interfere, and that they were trained to walk away if a customer walked up and to smile. And I said, well, I appreciate that, Shawn, except that that's not our practice. Our practice is they just come in, give them their card and longer conversations take place in the lunchroom, and that while you may tell them to be nice and to step back from a customer, customers aren't going to approach people that are talking to someone else, and he said, well, they had a right to be there and that if this is how I was going to handle things, he could have 15 reps there, and I said to him, I can tell you're getting very upset, and I said this really doesn't have to happen this way. We should just sit down and talk about it but right now it's disruptive at the store and they need to leave, and he said, well you do things or he said, he said, you do what you have to do and I'll do what I have to do. And that was the end of the conversation.

Barkeley did not testify.

Thornton issued and caused to be distributed to all represented employees a letter on company letterhead dated, October 22, 2009, that addressed the event of October 15. That communication contained a paragraph with bullet points some of which are set forth herein below:

> Usually, the union has one or two representatives in the store. Last Thursday, eight to twelve representatives descended on one store, some local some from out of town. Here's what happened next:
>
> - The reps held lengthy conversations on the sales floor, asking Associates to read and sign a petition which Associates were trying to serve Customers.

- Our manager asked them to observe the long-standing practice of talking more in-depth with Associates in the breakroom.
- The Union representatives refused to do this. As you can imaging [sic], having that many representatives on the floor talking to Associates was disruptive.
- They were asked multiple times to use the breakroom for their lengthy conversations, and were told that if they would not they would be asked to leave. They repeatedly refused.

2. The arrests

The arrest of Reed has been initially addressed in the recitation of her testimony concerning in-store events, supra. So, too, the above discussion brings the other seven union agents up to the point of their departure from the store into the store parking lot.

Michael Marshall,[14] then the Union's assistant director of collective bargaining, travelled to the Respondent's Hillsboro store on the morning of October 15, 2009, in Union Secretary Treasurer Jeff Anderson's vehicle with Union Agent Ken Spray. The car was parked in the store parking lot and the three union agents entered the store with the other agents teaming into pairs. Marshall paired with Ken Spray and walked the store visiting briefly with represented employees. Marshall, as the other union representatives in the store, came to be aware of the ongoing discussion and dispute involving Reed, Witt, and Dostert, the arrival of the police in the store, the arrest of Reed, and the presence of other police officers on the grounds. He left the store through the doors he had entered debouching into the parking lot.

Once in the parking lot, Marshall testified he went to Jeff Anderson's vehicle located in a parking slot in the parking lot. He found the car locked and stood there inasmuch as it was Anderson's vehicle, Anderson had the only key to the car and he had not as yet arrived to open the car so that Marshall could enter it. At this point Marshall recalled that Dostert who was in the parking lot yelled to Marshall to cause the photographer to stop taking pictures and Marshall answered that the photographer was not a union agent or employee.

At that point the police sergeant apparently in charge of the police on site turned his attention to Marshall and asked him to leave the area specifically telling Marshall he needed to leave. Marshall testified he explained his quandary to the officer, i.e., that he did not have the keys to the car and therefore could not enter it until its owner, Anderson, arrived. Marshall testified as to what happened at that point:

> The two officers that Jeff [Anderson] was speaking to, which were probably a good 50 feet away, came running across the parking lot, told me to stop. One each grabbed my hand. When the one grabbed my hand on the left side, knocked my notebook out of my hand to the ground. And the—as they were grabbing, grabbed my hand, started to handcuff me, the sergeant said, all you need to do is get off the property. You could even stand on the sidewalk somewhere. I said I'm willing to do that. I was just trying to get in the car over there. And one of the officers that had grabbed my hands to handcuff me said, you don't listen to our sergeant, you're going to jail.

Marshall was arrested, cuffed, and taken into custody. Marshall placed Dostert as approximately 20 feet away during his arrest.

Daniel Clay has been union president since 2008. On October 15, 2009, he was in his office in Tigard, Oregon, when he was informed by telephone that there was trouble at the Respondent's Hillsboro store. He knew at the time of the call that the Union was visiting that store that very morning. He drove to the Hillsboro store and drove into the store parking lot. There he observed quite a few people: store managers, police, and police cars. He also saw Reed in a police car and Mike Marshall cuffed and leaning up against a police car in the process of being arrested. Clay testified he left his car and approached the police officer he assumed to be in charge who was talking to store Food Manager Dostert.

Clay described the subsequent events:

> Q. What did you say to the officer?
>
> A. I asked that he not be arresting people, and told him that I was the one from the Union that was responsible for assigning people to come out and talk and asked that he not arrest people.
>
> Q. Did the police officer respond to what you said?
>
> A. Yes.
>
> Q. What did he say?
>
> A. Basically, it didn't matter.
>
> Q. Did you say anything else to the officer?
>
> A. Yes.
>
> Q. And what did you say?
>
> A. I talked to him about us having a contract that gave us a right to be there and talk to people. I talked to him about the National Labor Relations Act and asked that he look at the Federal law before he arrest people.
>
> Q. Did he respond?
>
> A. Yes.
>
> Q. What did he say?
>
> A. He said what mattered to him is whether or not the manager wanted me there.
>
> Q. And what happened next?
>
> A. He turned to the manager and said do you want him here.
>
> Q. And the manager again is—this is the same manager, Jim Dostert?
>
> A. Yes.

[14] Marshall testified respecting Joe Price's report at the October 14, 2009 union agent meeting concerning his experience at the Hillsboro store and the Union's reaction to those events:

> Well, we had had a—one of our International reps, Joe Price, had gone into the store with one of our, one of our local field reps the day before and had been told he was to be confined to the breakroom, could not be talking to members on the sales floor. We had—we were trying to update our membership on the status of bargaining and what was going on. It was important that we—that members knew what was going on, so we went in to get the message out, and to make sure people knew about the healthcare petition and had an opportunity to sign it.

Q. Did Mr. Dostert respond?
A. Yes.
Q. And what did he say?
A. Something along the lines of no, he doesn't have the right to be here.
Q. And what happened next?
A. The officer turned back and said you need to leave.
Q. Did he say why you needed to leave?
A. Because I wasn't wanted there by the management of the premises.
Q. Did you respond to what the officer said?
A. Yeah, I reiterated that I needed to—he needed to look at the Federal law and the National Labor Relations Act.
Q. Okay, and did the officer respond?
A. Yeah, he basically said no more discussion, or else I was going to be arrested, I guess.
JUDGE ANDERSON: Do you remember the words that he used, sir?
THE WITNESS: No, I don't think it was that clear. I think it was something like another word, and you're done or something like that.
JUDGE ANDERSON: All right, thank you.
Q. BY MS. FIORIANTI: And what happened next?
A. I again tried to talk to him about the rules, and he called over an officer, and I was taken to a police car.

Clay testified he had at no time ever entered the store or attempted to enter the store on that occasion.

Dostert also testified concerning the three arrests as he observed them. Dostert described what happened next:

> I needed some air, so proceeded to walk outside. I'm standing on the sidewalk, and I observed Mr. Marshall, I found later that it was Mr. Marshall, out farther in the parking lot behind a car having a discussion with an officer.
> Q. Were you in a position to overhear that discussion?
> A. No, I was not.
> Q. Did you see—can you describe what you saw?
> A. I saw Mr. Marshall get upset and look combative to me. He kind of stood there with fist clenched, and then shortly after that he was arrested.
> Q. Would you describe the nature of his arrest?
> A. I just saw him get arrested and escorted to a car, so I have no idea why.

Dostert then observed Union President Clay in the parking lot. Dostert testified:

> [Clay] walked up. I was standing behind the officer a few feet, and the officer was up by his car, and Dan Clay walks up and goes, officer, these people are under my direction. If anybody should be arrested, it should be me. The officer proceeded to say no, they are being arrested on their own actions, and that you need to leave. And Mr. Dan Clay again went, well, no, these are under my directions. If anybody should be arrested, it should be me. The officer said if you say one more word, you are going to be arrested also. And Mr. Clay proceeded to talk, and he was arrested.

The three union agents: Reed, Marshall, and Clay, were each arrested for trespass, removed, incarcerated, booked for trespass, and released on bail later that day. The terms of bail release prohibited the three bailees from contact with one another or contact with or visitation of the Respondent's property. These restrictions were modified on October 27, 2009, at the arraignment. Legal representation was secured and counsel represented the three during a process in which ultimately the charges were dropped.[15]

D. Analysis and Conclusions

1. The visitation/arrest allegations

a. Narrowing the issues

Before turning to the disputed events herein, it is well to consider what is and what is not in dispute and, importantly, precisely what aspects of the disputed events are necessary to resolve in order to reach conclusions respecting the allegations of the complaint. Initially then, the General Counsel's legal prima facia case must be considered in light of the elements disputed and undisputed in the case.

First, the General Counsel and the Union argue and the Respondent does not seriously contest the legal proposition that nonemployee union representatives meeting with employees on an employer's premises to discuss matters related to the employees' terms and conditions of employment pursuant to a contractual access clause are engaged in activities protected by Section 7 of the Act. *Turtle Bay Resorts,* 355 NLRB 706 (2010), adopting in full the earlier set aside decision reported at 353 NLRB 1242, 1242 fn. 6, 1274–1275 (2009). In agreement with the argument and the cited case, I find an employer violates Section 8(a)(1) by evicting union representatives from its premises, and by summoning law enforcement officials to remove or assist in removing them, when the union representatives have a contractually-established right to be on the premises to meet with the represented employees. *Turtle Bay Resorts,* 353 NLRB 1242, 1242 fn. 6, 1274–1275 (2009); *Frontier Hotel & Casino,* 309 NLRB 761, 766 (1992), enfd. sub nom. *NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir. 1995). Such conduct violates the Act because it interferes with union-related communications with employees and directly restrains employees from engaging in the union activity of communicating with their bargaining representative. *Turtle Bay Resorts,* supra, 355 706 (2010), adopting 353 NLRB at 1274–1275; *Frontier Hotel & Casino,* 309 NLRB 761, 766.

[15] The General Counsel alleged that the Respondent further interfered with the three bailees Sec. 7 rights by co-opting the objectivity of the prosecutor's office through the conduct of a member of the law firm of counsel for the Respondent who was at relevant times a legal advisor to the prosecutor's office. I dismissed that allegation at the end of the General Counsel's case finding there was insufficient evidence to overcome the presumption of the regularity of the acts of public officials in the absence of clear evidence to the contrary. See, e.g., *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001); and *Crow Gravel Co.,* 168 NLRB 1040, 1044 fn. 24 (1967) (both relying on *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926) (presumption of regularity attaches to official acts of public officers in the absence of clear evidence to the contrary)). *Calyer Architectural Woodworking Corp.,* 338 NLRB 315, 315 fn. 1 (2002).

The parties do not dispute the existence and applicability of the contracts' contractual visitation clauses and the parties' practice respecting those clauses to the October 15, 2009 events at the Respondent's Hillsboro store. They do however dispute and closely litigated the conduct of the parties' agents respecting whether or not the relevant contract language and the practice concerning them was complied with by the Union's and the Respondent's agents on that occasion. The General Counsel and the Union argue the union agent's actions fell within the contract language and applicable practices; the Respondent argues the union agents' conduct did not. The factual issue is plain and is central to the case. The legal issue to be applied to the resolved facts is whether or not the union agents conduct rose to misconduct which rendered their visit to the Hillsboro facility on October 15, 2009, unprotected under the Act and whether or not the Respondent's actions taken against the union agents was not improper as a result of that misconduct.[16]

Accordingly, the parties' practices in applying the contract language at issue must be considered and the events of October 15 closely scrutinized to determine what in fact was said by the union agents respecting what the union agents intended to do, what conduct they engaged in, and what the Respondent's agent Dostert told them in response respecting what conduct he would allow and what conduct he prohibited.

b. The contract language and the Parties' past practice

On October 15, 2009, the following contract language was in place and applied to the Respondent's Hillsboro store:

> It is the desire of the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

This contract language had been in place for a significant period of time. Thus there has been a period during which the parties have evolved a practice of applying its terms. In considering the evidence regarding practice, I received evidence concerning but here heavily discount practices and events occurring in organizational contexts. I rather have focused on situations and practices that concerned the Union's visitation of currently represented employees whose represented status was not in contest during the time of the visits. The Hillsboro store in October 2009 was not experiencing an organization campaign or a decertification campaign and the visitation process dealt with employees whose represented status was not under contest or dispute.

Relevant to this case are two aspects of the parties' visitation practices. Each devolves from the interpretation of the final sentence of the contract language: "All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties." First: when a union agent contacts a represented employee on the store floor when the employee is on the clock, how long and in what circumstances may the contact continue before it unreasonably interrupts the employee in the performance of his or her duties? Second, are there limits under the contract language to the number of union agents undertaking in store visitation of represented employee at a given store at any one time?

As to the first issue: length of in store visit employee contacts, the parties higher level witnesses recited essentially the same formula as to what the contract language meant and how the language had been applied by the parties. Essentially all these witnesses agreed that union representatives undertaking store floor employee visitation should avoid any and all contact with employees in situations where employees were dealing with store customers or situations where an employee should be assisting such customers. Further, virtually all who testified agreed that union agents should limit their store floor visits with represented employees to a reasonable time and, if further communication and time was necessary to complete or followup on such a visitation, the employee and union agent could go to the employee breakroom, arrange to meet when the employee was off duty or make other arrangements. There was some witness difference of position in the application of the contract's "reasonable" standard both in stating the rule and in applying it to various described circumstances. Thus the union witnesses tended to view the amount of time for employee-union agent store floor conversations was more generous than Respondent's representatives did in various settings. But more generally, the parties simply viewed the time allowed as a minute or two or possibly longer depending on the circumstances. Importantly to the issues in dispute herein, no interpretation of the rule and/or description of its historical application offered by the Respondent's agents, let alone the Union's agents, suggested that there was no time allowed beyond the time necessary for the union agents to introduce themselves and present business cards. Thus, there was no dispute and I find that union agents and employees on the store floor, within the limits noted, could discuss representational matters.

The second issue under the contract and practice: the permissible number of union agents in a store at any one time, was not so clearly delineated either in principle or in practice. While there was some evidence respecting the issue as to other employers under the contract in organizational settings, as noted, supra, I do not regard that context as relevant to the instant case. The Respondent asserted, and the evidence supports the view, that historically one union agent doing regular rounds, typically visited stores alone or, in the infrequent circumstance when a union agent was training a replacement or a new agent, in pairs. Other than in an organizational context: i.e., a pending RD petition or organizational efforts by the Union as to

[16] The Supreme Court made it clear almost 50 years ago in *Labor Board v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), with myriad Board and court cases following thereafter, that regardless of motive, an employer who discriminates against individuals who did not engage in misconduct and were engaged in protected activities, tends to discourage Sec. 7 activity and therefore violates Sec. 8(a)(1) of the Act. The test of any misconduct herein therefore is an objective one as opposed to subjective. Thus the test is not what misconduct the Respondent's deciding agents believed occurred by the union agents at the store at relevant times but rather what misconduct did in fact occur.

additional units within a partially organized store, the parties have not had a formalized disagreement regarding how many agents could visit a store for visitation purposes at any one time. The Union argued that it was not inherently unreasonable to visit a store in larger numbers than one or two union agents when the Union needed to inform the represented employees of some matter or matters concerning employees' rights. In a multiacre store, argues the Union, three or four pairs of union agents may not be held to be an unreasonably large group. The Respondent argues to the contrary.

c. What happened on October 15, 2009?

As set forth above there is no dispute that eight union business agents carpooled to the Respondent's Hillsboro store arriving at mid-morning on October 15, 2009, entered the store and fanned out in pairs to talk to represented employees, pass out union flyers to those employees and offer the employees a petition designed to encourage and record employee support for the Union's position in contract negotiations. It is similarly undisputed that the pair of Reed and Witt, following the letter of the visitation protocols, came to the Hillsboro store customer information station and asked that the store manager or MOD be called. Finally, there is no dispute that Dostert acting as the MOD was notified by telephone of Reed and Witt's presence, came to the information station, met the two and, at a time when Dostert had no knowledge of the presence of other union agents in the store, commenced what was to become a running conversation with Reed and Witt.

That conversation, with the subsequent limited participation of employee England and the later participation of security officer Kline and its conclusion with the arrival of police officers, and the arrest of Reed, is in dispute. It is clear the Union in Reed and Witt and the Respondent through Dostert came to an immediate and thereafter uncompromised dispute regarding the extent and nature of the Union's visitation rights in the store from the very first few words of the exchange between Reed and Witt and Dostert.

Each conversation participant testified respecting the event. Evidence of earlier events, conversations and telephone communications were offered into evidence as well as contemporaneous notes, a subsequent management report and an employer unit-wide communication to employees describing the event. The parties entered into the record a plethora of direct and tangential evidence, including hearsay and other evidence not offered for the truth of the matter asserted, respecting this extended conversation beyond the main body of evidence referred to above. In essence, these October 15, 2009 events were the heart of the 3 weeks of trial in this case.

All the above described evidence, along with the testimony of the witnesses in light of their credibility as demonstrated in part by their demeanor during their testimony, and in the context of the record as a whole which, as noted, supra, involves considerable additional evidence from other witnesses as well as the arguments of the parties has been considered in making the findings which follow. Such factual resolution is the classic jury function which, under the Act, falls to the administrative law judge.

In making the findings of fact concerning this dispute below, I wish to emphasize that the focus of this inquiry, the critical element of the conversation as I have characterized it, is what the on site union agents, Reed and Witt, and the on site agent of the Respondent, Dostert, said and did respecting the Union's visitation rights that day. The resolution of that question in the context of the instant case, will essentially resolve this aspect of the complaint. The other elements of the record testimony, other evidence and argument, was considered in these regards, but primarily for the purpose of resolution of the factual question described. This is so because, as will be discussed below, the internal communications between and among the Union's agents or between and among the Respondent's personnel, and the other events noted, on the facts of this case, do not have conclusive or even substantial weight in resolving the matter in controversy. This is so because, as discussed above, it is not what others on the Union or the Respondent's side believed happened at the Hillsboro store on that occasion, or what might have been reported to them as having happened there that resolves this dispute. Rather it is what in fact was said by the three between and among themselves before the exclusion and arrests that determine the propriety of the events put in issue by this aspect of the complaint.

The Government contends a proper union request for the opportunity to exercise protected activity, i.e., the undertaking of contractually-provided union visitation rights, was made at the store to Dostert by Reed and Witt and that proper request was wrongfully denied by Dostert who prohibited the visitation, interfered with it and ultimately caused the union agents to be excluded and three to be arrested. The Respondent argues the Union from the very beginning of the day so overreached the traditional contract visitation rights and practices that applied to the Hillsboro store on October 15, 2009, that the Union simply never sought to engage in or offered to engage in protected conduct. In the Respondent's view all else that followed was therefore not improper and not a violation of the Act. While there is considerable Board law applicable to cases of this type and of course law controls, the issue here in my view is one of fact: What happened?

The Union argues its agents simply asked for permission or announced an intention to Dostert that they were in the store to engage in contractually allowed, consistent with practice, store visitation, only to be told ab initio by Dostert in Reeds recollection: "We needed to go to the breakroom." Thus, the Union's view of the facts is that, from the onset and without the union agents ever describing the specific actions they intended to undertake in visiting with employees, and before they had undertaken any actions with employees, and before Dostert knew there were more than just the two union agents in the store, Dostert peremptorily denied the two union agents the right to visit with employees in any fashion whatsoever on the store floor. And thereafter he maintained that position and caused the exclusion and arrest of the union agents.

The Respondent contends the Dostert/Reed/Witt conversation was entirely different. Thus Dostert testified he told the two union agents: "I said, you guys know the drill, that you have a right to walk the floor, engage with associates for a minute or two, hand out your card; anything lengthier than

that needs to go to the breakroom." Dostert testified further that Reed responded "[T]hat she could talk as long as she wanted" with employees on the store floor and that things simply went downhill from that point with the union agents never being willing to follow contractual practice respecting visitation.

Restating the crux of the factual issue as defined above, the General Counsel and the Union marshal all their evidence to argue and advance the proposition that Witt and Reed announced to Dostert they were: "here in the store to do a visit and talk with members" and that Dostert simply replied the union agents "needed to go to the breakroom." The Respondent to the contrary emphasizes its evidence in support of the proposition that Dostert met with Reed and Witt and, upon learning of their desire to visit employees, correctly told them they had a right to walk the floor, engage with the employees for a minute or two, hand out their cards, but that anything lengthier than that needed to move employees into the breakroom. In the Respondent's view the union agents responded that they could visit employees on the floor for as long as they desired.

Everything hangs upon and falls naturally from which version of these events is sustained. If the Union's argument is credited, the Respondent's agent ab initio denied Reed and Witt their right to talk briefly to represented employees—a right that clearly extends beyond the very limited time necessary for identification and presentation of a union agent's business card to an employee. Since Dostert in this resolution denied the two union agents their contractual visitation rights before he even knew there were other union agents in the store, there is no question he denied them their rights for any reason based on their actions up to that time or, since he did not know there were more than two agents in the store, because he believed there were too many union agents in the store. This being so, Dostert was contravening the contract and the essentially undisputed practice of the parties under the terms of the contract, without justification, and was therefore improperly restricting the Union in its representation activities in violation of Section 8(a)(1) of the Act.

If the Respondent's view of events prevails, from the onset the union agents took the overreaching position they had a right and intended to exercise that right to talk to store employees in the store in the floor without limit as to time. The Respondent argues correctly that, if the lead union agent announced to the store manager on duty an intention that she and her union agent colleagues were going to talk without limit in time to the store employees on the floor, this intended conduct could be viewed as a violation of the contract's terms and the practices of the parties respecting those terms. In such a circumstance, the Respondent argues and I agree, Dostert could properly deny the union agents' access to the employees on the store floor and insist that the union agents use the employee breakroom for visitation or leave.

For the reasons set forth in greater detail below, and based on the record as a whole, including the arguments of the parties and my credibility resolutions which are based in significant part on my observation of the witnesses, I, in essence, credit the testimony of Reed and Witt and discredit the testimony of Dostert where their testimony differs on this primary question. This being so, I find that from the onset of the Reed/Witt/Dostert conversation through the expulsion of the union agents from the Respondent's premises and the associated invocation of police authority, the Respondent at all times denied the Union its contractual visitation rights as established under the contract and past practice. For the reasons set forth below, I credit the General Counsel and the Union's view of what occurred—essentially Reed and Witt's version of events—and discredit the Respondent's view of what occurred—essentially Dostert's version of events.

In resolving the conflicting testimony concerning this important three-way conversation, primarily a credibility resolution respecting the starkly inconsistent testimony of Dostert versus Reed and Witt, I considered the fact that both Reed and Dostert were present in the courtroom for the testimony of other witnesses, but other witnesses were not. To understand how this came about in the instant case, it is necessary to consider the trial practice of sequestration of witnesses. Sequestration of witnesses, as provided by Federal Rule of Evidence 615[17] which applies to NLRB unfair labor practice hearings, is the act of separating witnesses from the courtroom during the testimony of others and keeping the separated or sequestered individuals from learning of the content of the testimony of other witnesses, so that the testimony of those other witnesses does not influence the testimony of the sequestered witnesses. This practice, which may occur on the motion of any party, has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion respecting testimony. 6 Wigmore §§ 1837–1838. See also the advisory notes to Federal Rule of Evidence 615.

There was a sequestration order in place in the instant matter. All witnesses were kept separate from the trial proceedings during the testimony of others with two exceptions. Reed and Dostert were named by the two sides as essential to the presentation of the parties' case and the two were therefore properly exempted from sequestration and were in fact present in the courtroom essentially for the entire proceeding. Thus, in listening to the testimony of others during the 3-week trial, they were exposed to multiple versions of events and circumstances as advanced by counsel and the other witnesses during the trial.

Since both Reed and Dostert gave testimony concerning the same disputed conversation and events of October 15, 2009, after having listened at great length to the versions of other witnesses about those same events, there was a possibility that their later testimony—especially that testimony that came later in the trial after the bulk of the other testimony was received—was informed by the content of the other witnesses testimony rather than just based on their own pretestimonial memory of

[17] Federal Rule 615, Exclusion of Witnesses, states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

their experiences. For that reason any evidence of these two witnesses versions' of events memorialized closer in time to the events themselves is of special value because it predates these individuals exposure to the others testimony. Thus evidence respecting these witnesses pretrial NLRB affidavits and Dostert's October 15, 2009 written report to higher management of that day's events, Respondent's Exhibit 36, is of special worth.

A portion of Dostert's report, Respondent's Exhibit 36, states:

> At approximately 10:00 am the CID desk called me to have me come to the desk as the union was letting the MOD [know] they were on site. I me[]t them at the desk and shook hands introducing myself as the mod.[sic] I informed Brad Witt and female rep what [I was] told on Wednesday, (14th) that they could approach associates and hand out their card and they would be in the breakroom for further information. They proceeded to pull out a piece of paper with a Supposed federal law/union contract saying they can talk to the associates while they are working that I would be violating federal law if I did not let Them.

I found that document to be of significant weight because it was prepared at a time when Dostert was recording what he recalled he, Witt, and Reed had said earlier that day and was doing so when his recollection was both fresh in his memory and when it was also untainted by any notions of what he should have said rather than what in fact he did say. Thus, this written version of what was said was uninfluenced by the opinions of testimony of others, such as counsel, the Respondent's higher management, or other witnesses, about what the policy was and how he described it to Reed and Witt.

Critically, Dostert's report tracks more closely Witt and Reed's version of this important initial exchange, i.e., the Union's presence and Dostert's initial limitation and caution to the union agents as to what they could and could not do: "they could approach associates and hand out their card and they would be in the breakroom for further information."

Consistent with and essentially corroborating this version of events is the undisputed fact that Dostert would not allow the union agents to speak to a represented employee on the store floor at all—for any length of time—when they tried to do so. Thus, it is undisputed that when Reed approached employee England, who was located on the floor at a closed cash register undertaking a project of some unidentified type, Dostert admittedly intervened and instructed England with some passion not to talk to Union Agent Reed.

An important, indeed critical, element in my credibility resolution here is my determination, based on my observation of the witnesses' demeanor during their testimony, that Reed and Witt were making an honest effort to testify, and were in fact testifying from their memory of events of that day. My impression of Dostert's testimony was much less for two reasons. First, I found his demeanor less persuasive in that his testimony was more adversarial. Thus, it seemed to me Dostert took his role as witness to be part of a contest in which he was an advocate as well as a source of information. I formed the impression that Dostert was more influenced in answering the questions presented by what he thought would better serve his employer's interests and his own rather than simply what he recalled was said and done. In answering a range of questions, including his denials and parsed denials[18] respecting disparaging remarks attributed to him, Dostert's testimony was inconsistent with the contemporaneous notes taken by Witt who recorded Dostert's remarks. I found Witt's testimony about making his notes credible and the notes themselves to be persuasive evidence of Dostert's statements. Further, as noted in his testimony generally, I found Dostert's denials of the remarks attributed to him which I have found in fact were made by him suggested that he was not searching his memory so much as simply denying having said the things attributed to him that he did not believe would favor his or his employer's positions. In consequence of all the above, I discredit Dostert's testimony to the extent it differs from that of Reed and Witt.

Second, I also think there is a substantial possibility that Dostert at least during the events themselves and for a period thereafter, simply did not notice or focus on the critical distinction between: (1) a visitation policy which allows union agents to identify themselves to represented employees, but no more, with any additional conversation to take place off the floor such as in the breakroom and, (2) a visitation policy which allows union agents to identify themselves to represented employees and to talk to those employees on the floor for an additional reasonable period of time—perhaps 1 or 2 minutes depending on circumstances. This element could explain the seeming inconsistency in the telephonic reporting Dostert engaged in during the events and the findings I have made here respecting what he did in fact say to Reed. My findings here however are not reliant or dependent on this being so.

The running conversation of the three—Dostert/Reed/Witt, as I chose to label it, was lengthy, moved several times within the store and, as noted above, involved others. I do not find that everything that Dostert testified he or others stated in that conversation should be discredited or that Witt or Reed was complete or perfect in his or her testimony. In the event, passions ran high. Things were confused. Passion, anger, and stress can cloud the accurate formation of an individual's memory of events or even an impassioned participant's original perception of events. Nonetheless, and concerning which I have carefully considered the conflicts and the entire record on the issue, I am convinced and find that the General Counsel has sustained his burden of establishing that the Union through its agents, Witt and Reed, sought and announced to Dostert, as they testified, a desire and an intention to do no more than talk briefly with the Union's represented employees on the shop floor and did not directly or indirectly state or suggest otherwise that they commanded the right or intended to undertake to talk to those employees on the shop floor without limit as to time.

Further, I find and conclude on the same basis that Dostert simply announced in answer to that request/intention to visit with employees on the floor that the two agents must limit their

[18] Thus for example Dostert denied making disparaging remarks concerning the Union, union policies or agents, but thereafter conceded he might well have called Witt a "jerk," just not union agents generally jerks.

contact with employees on the store floor to identification and introductions only with all additional communication between agent and employee required to be off the floor in the breakroom. Thus, I find Dostert, in contravention of the contractual visitation policy, denied the proper visitation request of the two union agents—and later their six colleagues as the events unfolded—and in so doing denied the Union its contractual right to communicate with the represented employees in the store for a reasonable time and in reasonable circumstances.

d. Analysis of the visitation issue

(1) Certain of Respondent's defenses rejected

The Respondent argues that the Union in effect planned the October 15, 2009 event, brought its own photographer, deliberately provoked the Respondent's reaction by it's conduct on October 14, 2009, by bringing eight agents into the store on October 15, 2009, and by refusing to vacate the store after being asked to do so. The Respondent suggests this entireuUnion course of conduct was all a ruse designed to gain press notoriety in support of contract negotiations and to establish the "fighting" aggressiveness of a new union administration. The Union and the General Counsel dispute the asserted defense.

I have considered the Respondent's evidence and arguments in evaluating the credibility of the witnesses herein. I do not find there is sufficient evidence to suggest that the Union institutionally or by preplanning decided to have a photographer attend the Hillsboro store. I credit Witt's testimony, above, that he did so individually as he described. Neither do I find that the Union had a plan in place to provoke an arrest or arrests to better establish its fighting trade union bona fides. I do agree with the Respondent that the Union planned the October 15 visit in at least partial reaction to the Union's perception that the Hillsboro store had not been allowing the Union its contractual visitation rights on the previous day.

As a matter of law however, if a union has the right—a protected right under Section 7 of the Act—to visit employees in a store, it does not lose or diminish that right by exercising it even in the face of likely or even stated employer intention to halt or prevent such protected activities. A refusal to "back down" from asserting Section 7 rights, standing alone under such circumstances, does not make the otherwise protected actions' for that reason unprotected. A right is ephemeral indeed if it disappears or is diminished by reason of its assertion in the face of likely resistance or refusal.

The Respondent also argues that, irrespective or independent of the question of the quantum of time the union agents were to be allowed to talk to represented employees on the store retail floor, the union actions were rendered unprotected because there were simply an unreasonable number of agents in the store. The contract reasonably interpreted and the practice of the parties, argues the Respondent, simply did not on October 15, 2009, allow or privilege eight agents to engage in employee visitation in a single store at the same time. The General Counsel and the Union oppose this argument.

I have made no findings respecting either the reasonableness of having eight visiting union agents in a store at one time under the contract language quoted above or whether or not such actions were, as of October 15, 2009, inconsistent with past practice.[19] I find that I simply do not need to because the question is irrelevant to the resolution of the complaint allegations. This is so because as I have found above, the number of agents in the Hillsboro store was simply not initially asserted as a basis for denying the union agents the right to visit employees on the store floor or requiring them to leave the store. As noted above, there is no dispute that Dostert denied Witt and Reed visitation rights before he ever knew there were more agents than those two in the store at the time. Dostert never invoked the excessive number of agents to Witt or Reed as a basis for denial of visitation right or as a reason for asking the agents to leave. Indeed Dostert made it very clear that the only reason for his denial of the Union's visitation rights was the question of the duration of floor visitation and, if the union agents would only go to the breakroom, all would be well. In effect, I hold Respondent to the basis or rationale asserted by its agent, Dostert, when he denied Witt and Reed visitation rights and directed that they leave the facility, as found above.

(2) Conclusions regarding visitation

Based on the findings set forth supra, I have found that on October 15, 2009, the Union, through Reed and Witt, sought union visitation of represented store employees at the Hillsboro store consistent with the terms of the contract and past practice. I further found that the Respondent through Dostert denied the Union those visitation rights.

I have noted, supra, that nonemployee representatives in such situations are engaged in activities protected by Section 7 of the Act and an employer's denial of those rights violates Section 8(a)(1) of the Act. *Turtle Bay Resorts,* 355 NLRB 706 (2010). I make that finding here. When the Respondent's agent Dostert denied the Union's agents, Witt and Reed, the right to visit represented employees in the manner discussed above, and when he had them removed from the Respondent's premises for insisting on their right to so visit represented employees, the Respondent violated Section 8(a)(1) of the Act. *Turtle Bay Resorts,* supra.

e. Analysis of the arrests issue

(1) The arrest of Reed

There is no dispute and I have found that Reed was asked to leave the store and refused to do so insisting on her statutory right to visit represented employees consistent with the contract. In consequence the Respondent summoned local police and asked them to remove Reed as a trespassing union agent. When she refused to leave she was arrested, taken to jail, charged with criminal trespass, booked, and released on bail that evening. After legal actions relevant to the matter over a period of time, the initial restrictions on behavior required under the terms of her bail release were narrowed and finally the trespass charges were dropped and the matter concluded.

[19] An arbitrator's decision involving another employer had limited organizational visitation to two agents in a store at one time, but, as I have noted supra, an organizing or representational context is simply distinguishable from the instant issue of contractual rights of represented employees. I found supra and reassert here that such a context is simply different and legally distinguishable from the visitation rights at issue here.

Given my findings on the visitation aspect of the instant case, supra, it is clear and I find that the Respondent's actions respecting Reed in the circumstances described were also in violation of Section 8(a)(1) of the Act. An employer violates Section 8(a)(1) by evicting union representatives from its premises, and by summoning law enforcement officials to remove or assist in removing them, when the union representatives have a contractually-established right to be on the premises to meet with the represented employees. *Turtle Bay Resorts,* supra, adopting 353 NLRB 1242, 1242 fn. 6 1274–1275 (2009); *Frontier Hotel & Casino,* 309 NLRB 761, 766 (1992), enfd. sub nom. *NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir. 1995). The conduct violates the Act because it interferes with union-related communications with employees and directly restrains employees from engaging in the union activity of conversing with their bargaining representative. *Turtle Bay Resorts,* supra, adopting 353 NLRB 1242, 1274–1275 (2009); *Frontier Hotel & Casino,* 309 NLRB at 766.

(2) The arrests of Marshall and Clay

The arrests of Marshall and Clay arose in a slightly different context from that of Reed. Marshall was arrested by the authorities as described above in the Respondent's parking lot after having exited the store and gone to the vehicle in which he had arrived as part of the union agents' car pool. Marshall testified without contradiction he was unable to enter the locked car because the driver and door key possessor, Anderson, had not as yet arrived at the vehicle. Marshall had entered the store with the intent to visit with represented employees and exited the building under Respondent and police direction.

Clay, as set forth above, arrived at the Respondent's store parking lot from the Union's offices only after the store exiting process was underway and was arrested by the police in the parking lot as he protested their arrest of Reed and Marshall, the Respondent's removal of the union agents from the store and the denial of the union agents desire and right to visit represented employees in the store. Clay never entered the store. Once arrested, Marshall and Clay received identical treatment with Reed. The two were arrested by the police, taken to jail, charged with criminal trespass and no other offenses, booked and released on bail with restrictions on their conduct effective while on bail that evening. After legal actions relevant to the matter occurring over a period of time, the initial restrictions on the bailees' behavior associated with their bail release were narrowed and finally the trespass charges were dropped and the matter concluded.

Reed suffered arrest—specifically for trespass and for no other reason—directly arising out of her unwillingness/her refusal to abandon her effort to visit store employees and leave the Respondent's premises. The Respondent's agent, Dostert, directed the police to remove Reed from the premises for that reason. Even though the Respondent emphasizes that it did not direct the police to arrest Reed, the causation is linear and the Respondent stands responsible.

Marshall also arrived and entered the store with an intention to visit store employees. He chose to abandon his efforts, exit the store, and was in the process of leaving the parking lot when his arrest occurred. While the Respondent did not request or direct, beyond the original "clear the store" instruction, that Marshall be arrested—he was specifically arrested for trespass and for no other reason—in the parking lot, Dostert was clearly present and able to observe the process of Marshall's arrest in the parking lot and, in so far as the record suggests, made no statement or comment to the police respecting putting a halt to the arrest as the event unfolded.

Clay arrived after the Respondent's direction to the police to clear the store. There is no dispute he had not originally planned to enter the store as part of the visitation efforts of the Union nor did he do so. As described, above, he parked his car in the Respondent's parking lot, exited it, approached the officers and protested to the police as the arrests of Reed and Marshall were being perfected and was then arrested himself—again solely for trespass. Clay testified that Dostert told the police that Clay did not have a right to be in the store parking lot and the police then arrested him. Dostert testified he only observed Clay's arrest without making comment of any kind.

I find it unnecessary to resolve the dispute respecting the extent of Dostert's role in Clay's arrest. There is no doubt Dostert was able to observe the event from his location in the parking area outside the store, but as with Marshall's arrest, Dostert at the very least took no action to stop the arrest and, in so far as the record suggests, made no effort to restrain the police or undo the arrest as the event unfolded. The police arrested Clay and Marshall because of the Respondent's agent's initiation of the removal process. Once the Respondent's agent Dostert had the removal process underway and the police involved, and once Dostert observed the arrest of Reed and the moments away arrests of Marshall and Clay, he was obligated to stop the arrests of Marshall and Clay—as he easily could have done, if he was to escape responsibility for their arrest. Not having done so under all the circumstances described, the Respondent is liable under the cited case law for the arrests and the consequences of the arrests. I therefore find the Respondent violated the employees Section 7 rights of its represented employees through the arrests of Marshall and Clay as well as that of Reed.

In *Wild Oats Community Markets*, 336 NLRB, 179, 181 (2001), the Board determined that an employer's "actions constituted an indirect attempt to expel the Union representatives and, consequently, constituted interference with employee Section 7 rights." In that case, the respondent notified the owner of the shopping center where Wild Oats was located and notified the owner of the shopping center (who had a no-solicitation policy) that hand billers were outside the store. That action caused the shopping center owner to call the police. The Board described such action by the respondent as "initiating a chain of events that culminated in the attempted removal of non-employee Union representatives engaged in lawful, protected activity from the parking area in front of the Respondent's store." Id. at 180. While the police did not arrest any of the handbillers, the Board still found a violation of the Act, writing at 336 NLRB at 181:

> It is beyond cavil that had the Respondent directly ordered the Union representatives to cease picketing and vacate the premises or, alternatively, directly requested the police to remove

> the Union representatives, the Respondent would have engaged in unlawful interference with employee Section 7 rights. [Citations omitted.] It would be anomalous, therefore, to permit the Respondent to accomplish the same objective by indirect means—to engage in conduct that has the intended and foreseeable consequence of interfering with employee Section 7 rights. Indeed, the Board in other contexts has indicated its willingness to hold employers responsible for violations of the Act that are proximate and foreseeable results of the employer's action. See generally *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984).

In *Sure-Tan*, after a union won a representation election, the employer, in violation of the Act, sent a letter to the Immigration and Naturalization Service (INS) asking it to check the immigration status of several employees and sparked an INS investigation that resulted in many employees leaving his employ. The Supreme Court determined that the "petitioners' letter was the sole cause of the investigation" and upheld the administrative law judge's conclusion that

> [B]ut for [petitioners'] letter to Immigration, the discriminatees would have continued to work indefinitely. 234 NLRB at 1191. And there can be little doubt that [the petitioner] foresaw precisely this result. Id. at 884.

The *Sure-Tan* and *Wild-Oats* decisions show the Supreme Court and the Board's willingness to hold those who commit unfair practices responsible for the proximate results of their actions. Consistent with the Board's ruling in *Wild Oats*, the Respondent is liable for even the indirect consequences of Dostert's initiating actions. It was "proximate and foreseeable" that when the Respondent summoned the police to the store to remove union agents that the police well might arrest some or all the union agents exactly as it in fact did and charge them with trespassing.

I find that in the context of events present here, and within the standard of forseeability described in *Sure-Tan* and *Wild-Oats,* there can be no question that Marshall's arrest was a foreseeable consequence of the Respondent's instruction to the police to evict the union agents, including Marshall, not just from the store but also from the entire premises which included the parking lot. Were that not Dostert's intent at the time of his communication with the police officers, he certainly had occasion to observe that the police were in fact arresting union agents who were not with sufficient speed exiting the parking lot. And Dostert knew this was true as he was able to easily observe the arrest with sufficient time to have stopped the police's arrest of Marshall had he thought otherwise.

Clay in essence was also arrested by the police for associating himself with the union agents, for protesting to the police respecting their actions, and for refusing to leave the parking lot consistent with the Respondent's removal order. He like Marshall and Reed was arrested for and charged only with trespass. His arrest was observed by Dostert who, under any resolution of his disputed role in the arrest, withheld a staying hand and did not take any action or address any limiting instruction to the police. Clay's actions were directed to making common cause with the union agents—his agents—under arrest and with those others that had been wrongfully excluded from the building and were being excluded from the entire premises which included the Respondent's parking lot. I find that Marshall and Clay stand in the equivalent shoes of Reed and, for all the above reasons, find their arrests in the circumstances presented also violate Section 8(a)(1) of the Act.[20] It was, after all, the Respondent's agents herein that "Cry 'Havoc,' and let slip the dogs of war." Julius Caesar, Act 3, scene 1, LL. 270–275, William Shakespeare.

2. The October 15, 2009 Dostert statements as violations of Section 8(a)(1) of the Act

The amended complaint alleges in paragraph 9 that the Respondent on October 15, 2009, at its Hillsboro, Oregon store through its store Home Department Manager Jim Dostert:

> (a) Directed employee not to speak with Union representatives;
>
> (b) Told Union representatives that they could not speak to employees;
>
> (c) Told Union representatives that they must go to the employee breakroom in order to speak with employees;
>
> (d) Disparaged the Union in the presence of employees by stating that:
>
> (i) Union representatives are jerks;
>
> (ii) Unions are outdated and ridiculous;
>
> (iii) Union dues are ridiculous; and
>
> (iv) Union representatives and the Union are stupid;
>
> (e) Threatened to have Union representatives arrested or removed from the store because they would not restrict their conversations with employees to the employee breakroom; and
>
> (f) Instructed Hillsboro store Loss Prevention Manager Michael Kline in the presence of employees to contact the police to have the Union representatives arrested or removed from the store because they would not restrict their conversations with employees to the employee breakroom.

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[20] The Board in *Venetian Casino Resort, LLC,* 355 NLRB 919 (2010), dealt with the question of whether and employer's summoning of police was a direct petitioning of the Government and therefore protected by the First Amendment to the Constitution in a complicated procedural situation. An initial Board decision had gone to the United States Circuit Court of Appeals for the Ninth Circuit Court of Appeals for enforcement and the court remanded the case for further consideration of that narrow issue. 484 F.3d 601, 610, 614 (2007), cert. denied 128 S.Ct. 1647 (2008). The Board addressed that remand as a two-member Board at 354 NLRB 120 (2009). The Supreme Court in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2009), found such two-Board member decisions invalid. In the Board's August 27, 2010 decision, cited above, the Board dealt again with the circuit court's petitioning question on remand by stating that it was going to sever the question from the case and undertake further consideration of the court's remand. Thus that question in the noted remand context remains before the Board.

Given all the above, I find the Board's decision reserving the question presented by the court of appeals on remand does not establish new Board law changing or controlling over the otherwise current Board law, cited supra, that the Respondent's summoning of the police in the circumstances presented violated Sec. 8(a)(1) of the Act.

a. Complaint subparagraphs 9(a), (b), (c), and (e)

Given that I found, supra, based on credibility that Dostert told Reed and Witt that they must go to the breakroom if they wished to speak to employees beyond identifying themselves, and my other findings supra, there are no further factual disputes concerning the conduct alleged in complaint subparagraphs 9(a), (b), (c), and (e). As to the law, the cases are clear, with *Turtle Bay*, supra, being the most current, that such employer statements and restrictions on union agent access in the context of excluding actions when there is a contract right to visit employees violate represented employees' Section 7 rights and therefore violate Section 8(a)(1) of the Act. I so find.

b. Complaint subparagraphs 9(d)(i), (ii), (iii), and (iv)

These complaint subparagraphs require further consideration of the arguments of the parties and analysis since they involve additional disputed facts and circumstances.

I credited Witt and his contemporaneous notes supra that Dostert made the following remarks in the on going conversation between Reed, Witt, and Dostert:

> "Cannot talk to ees on the sales floor."
> "I'm tired of these union people."
> "Union reps: jerks."
> "Union dues are ridiculous."
> "Unions are outdated and ridiculous."
> "You're not anyone to me."

I also credited Reed respecting her recollections of the conversation including that part that took place in the presence of England. She testified that Dostert in a raised voice with raised voice in anger stated, inter alia:

> [T]that we were only here for people's dues money, that people—these members did not need a union. He asked me how much money we'd stolen from these members. That he didn't believe in unions, that we didn't need unions, and he wanted us to leave.

England testified that she was working at a closed check stand in the apparel department when she was approached by Union Agent Reed and Manager Dostert. She testified that Reed came to her and said:

> "I have the right to speak to you, I'm from the Union", and she handed me a paper with something on it that was going on with the Union at that time."

England testified that she was focused on listening to what Reed said to her and that Manager Dostert was right next to Reed at the time. She further testified: "I do not recall: when asked if the home manager said anything to her at that point in time. No other questions were asked of her respecting what she heard. She did testify however that the approach of Dostert and Reed was "a little bit overwhelming."

The Respondent's argument that the testimony of Reed and Witt in these regards should be discredited has been rejected supra. Respondent argues further however that the General Counsel did not establish that any statutory employee overheard the claimed remarks of Dostert other than England who is hearing impaired and did not testify she heard any of the remarks. The test of whether or not England heard the remarks at issue is one of fact.

Contrary to the argument of the Respondent, England did not testify that she did not hear statements of Dostert. England testified she focused on Reed, that Dostert was next to her and that she "did not recall" whether or not he made any remarks. And there is no dispute that Dostert in a loud manner at the start of the contact with England, instructed her not to talk to Reed. The Respondent notes England is hearing impaired. The record establishes she wears a hearing aid, hears best when facing the speaker and augments her hearing with lip reading. In this connection I note and find important: that she was facing Reed and Dostert, was close to them at the time of the events in contest, and was focusing on the two individuals. She testified as to the specifics of what Dostert was doing during these events. Given all the above, I find the statements of Dostert described by Reed supra as being made in the presence of England, were reasonably heard by her given all the circumstances including her auditory circumstances. Therefore I find the remarks were made in the presence of a represented statutory employee.

The Respondent argues on brief at 67:

> Disparaging remarks "that [do] not suggest that the employees' protected activities were futile, [do] not reasonably convey any explicit or implicit threats, and [do] not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights" do not violate Section 8(a)(1). *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004); see also *Sears, Roebuck & Co*., 305 NLRB 193 (1991).

The General Counsel implicitly accepts Respondent's argument but counters on brief at 40–41:

> In *Turtle Bay Resorts,* 353 NLRB [1242, 1278–1279] (2009), while recognizing that "[W]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)," the Board nevertheless found the supervisor's disparaging comments to be a violation when considered along with the threats accompanying the disparaging comments. Similarly, in *Advanced Architectural Metals, Inc.,* 351 NLRB 1208, 1216 (2007), the Board affirmed the ALJ's finding that a directive to an employee to talk to a manager about problems rather than the "stupid union" unlawfully disparaged the union and tended to restrain employees in the exercise of their rights to consult with and be represented by their union.

I find the General Counsel's cited cases, especially *Turtle Bay* and noting that the cited *Turtle Bay* decision was adopted by the Board in *Turtle Bay Resorts,* 355 NLRB 706 (2010), controlling here. Accordingly, I find that Dostert's disparagement of the union agents and the Union as testified to by Reed in the presence of England violated Section 8(a)(1) of the Act. I find violative however only the statements I have found were made by Dostert specifically above rather than the attributions recited in the complaint subparagraph.

c. Complaint subparagraph 9(f)

The complaint subparagraph alleges that Dostert instructed Hillsboro store Loss Prevention Manager Michael Kline in the presence of employees to contact the police to have the union

representatives arrested or removed from the store because they would not restrict their conversations with employees to the employee breakroom. Given my earlier findings, the sole remaining unresolved element respecting this allegation is whether or not Kline received his instructions for Dostert in the presence of employees.

The General Counsel argues on brief at 22–23:

> An employer further violates Section 8(a)(1) by threatening and causing a Union representative's arrest for meeting with employees on its premises when its efforts to bar the representative from its premises are unlawful. See, e.g., *Downtown Hartford YMCA,* 349 NLRB 960, 972–973 (2007). Accord: *Jerry Cardullo Ironworks, Inc.,* 340 NLRB 515, 521 (2003); *Fabric Warehouse,* 294 NLRB 189, 192 (1989), enfd. sub nom. *Hancock Fabrics v. NLRB,* 902 F.2d 28 (4th Cir. 1990). See also *Indio Grocery Outlet,* 323 NLRB 1138, 1142 (1997) (employer violated Sec.8(a)(1) by threatening to have union representatives arrested, and thereafter requesting and causing police to arrest them, for picketing and distributing union-related literature on its premises where it did not have lawful right to exclude them from the property). Such conduct violates Section 8(a)(1) regardless of whether employees hear the threats or witness the arrests because the conduct itself interferes with the exercise of Section 7 rights. *Roger D. Hughes Drywall,* 344 NLRB 413, 415 (2005). Applying the above precedent to the record evidence developed at trial demonstrates that Respondent violated Section 8(a)(1) as alleged in the Amended Complaint.

The Board in *Roger D. Hughes Drywall,* supra, noted further at 344 NLRB at 415:

> The Board has found 8(a)(1) violations based on employer's actions such as calls to police, threats and attempted arrests, and harassment with water sprinklers directed against area standards picketers and Union agents without reference to whether these actions were witnessed by any of the employer's statutory employees. See *Corporate Interiors*, 340 NLRB 732, 745–747 (2003), citing, inter alia, *Bristol Farms*, above. See also *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999), enfd. 240 F.3d 26, 29 (D.C. Cir. 2001) (union's area standards activity on behalf of employees whom it represents is protected activity).

This being so, I find it is unnecessary to determine if Kline, as alleged in the complaint subparagraph, was instructed by Dostert in the presence of employees to contact the police to have the union representatives arrested or removed. Clearly Dostert took the action described. The cited case makes it clear that the presence or absence of employees in such circumstances is immaterial. Accordingly I find the Respondent by taking the actions described violated Section 8(a)(1) of the Act whether or not employees were present when the Respondent's agent, Dostert, told the Respondent's agent, Klein, to take the actions indicated.

3. The October 15, 2009 conduct of the Respondent's agents as a violation of Section 8(a)(5) and (1) of the Act

The complaint alleges in paragraph 13, that the Respondent's Hillsboro store Home Department Manager Dostert in limiting the union agents' rights to contact represented store employees within the facility on October 15, 2009, in a manner inconsistent with the parties' past practice, unilaterally changed the terms and conditions of union-represented employees within the store without notifying the Union, bargaining with the Union respecting the change or obtaining the Union's permission and, in so doing, the complaint alleges in paragraph 14, the Respondent violated Section 8(a)(5) and (1) of the Act.

The General Counsel urges I find a violation of Section 8(a)(5) and (1) of the Act occurred based essentially on my findings and conclusions respecting the other allegations of the complaint. The General Counsel argues as follows. First, the Respondent and the Union had a contract with language and past practice consistent with the request of Reed and Witt to visit represented employees. Second, the Respondent at all times at the Hillsboro store on October 15, 2009, failed and refused to allow visitation rights and prohibited them by variously, telling the union agents to stop attempting to visit with store employees and to leave the store, telling employees not to talk to the union agents, and, finally, by summoning the police and instructing them to remove the union agents as trespassers, thereby initiating a process resulting in the police undertaking the removal and arrest of union agents. Third, the Union was not provided with notice of, nor an opportunity to bargain respecting, the denial of the previously granted and historically utilized visitation rights. These elements, in their totality, argues the General Counsel, rise to the level of a denial of a negotiated and contract right and practice undertaken by the Respondent unilaterally: a classic violation of Section 8(a)(5) and (1) of the Act.

The General Counsel cites supporting Board cases on brief at 41:

> A change in the parties' practice with respect to in-store visitations by Union representatives constitutes a material change. *Ernst Home Centers,* 308 NLRB 848, 848–[8]49 (1992). Accordingly, an employer violates Section 8(a)(1) and (5) by unilaterally altering the parties' contractual access provisions or practice. See, e.g., *Turtle Bay Resorts,* 353 NLRB [1242, 1274–1276] (2009); *Frontier Hotel & Casino,* 309 NLRB 761, 766 (1992), enfd. sub nom. *NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir. 1995); *Ernst Home Centers,* 308 NLRB at 848–[8]49.

The Charging Party focuses its posthearing brief on this issue and provides a scholarly recitation of Board and court cases. The Charging Party argues on brief at 2:

> The Board has "long held that a union's access to represented employees on an employer's premises is a mandatory subject of bargaining and that an employer's unilateral modification of contractual access provisions violates Section 8(a)(5) of the Act." *American Commercial Lines, Inc*., 291 NLRB 1066, 1072 (1988) (citing *Campo Slacks, Inc.*, 250 NLRB 420, 429 (1980), enfd. mem. 659 F.2d 1069 (3d Cir. 1981); *Boyer Bros., Inc*., 217 NLRB 342, 344 (1975), *Granite City Steel Co*., 167 NLRB 310 (1967)).

The Respondent's arguments respecting this paragraph of the complaint essentially track its arguments set forth and rejected

above addressing the earlier considered allegations of the complaint respecting the parties' practice in applying the contractual language at issue and the events occurring at the Hillsboro store on October 15, 2009.

Given my factual findings, supra, the cases cited by the General Counsel and the Charging Party are on point respecting the law applicable to unilateral changes in the circumstances of the instant case. As found supra, Dostert on October 15, 2009, simply prohibited the two union agents, who announced they were there to speak to represented employees, from doing so on the shop floor. The subsequent arguments about what would or would not have been reasonable or inconsistent with practice beyond that simple prohibition was, I reiterate here, not material to resolving the earlier allegations and they are also not relevant to resolving the instant allegation. Thus the complaint alleges the violation occurred on October 15, 2009, through Dostert. The allegation, paragraph 13 of the complaint, does not allege any other Respondent agents engaged in a violation of the Act in this complaint paragraph. No continuing theory of a violation is alleged. Thus, subsequent positions of the parties on the reach and applicability of the contract and its history of application to later events is not material to the analysis of this allegation and the cited cases control.

Given all the above, I sustain complaint paragraph 13 and find that the Respondent, through Dostert, in denying the two union agents access to store employees on the store floor under the circumstances found herein violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, based on Section 9(a) of the Act, the Union has been the exclusive representative of the following units of the Respondent's employees for purposes of collective bargaining:

The Grocery, Produce, and Delicatessen (Grocery) Unit:

> All employees within the jurisdiction of United Food & Commercial Workers' Union Local 555, covered by the wage schedules and classifications listed herein (head clerk/head produce clerk, journey person clerk, apprentices, courtesy clerks, demonstrators, container clerks employed in the grocery, produce and delicatessen departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Combined Checkout (CCK) Unit:

> All employees employed in the Respondent's combination food/non-food check stand departments in all present and future combination food/non-food check stand departments in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Retail Meat Unit:

> All employees covered by the wage schedules and classifications listed herein (head meat cutter, journeyperson meat cutter, apprentices, journeyperson meat wrapper, lead person, journeypersons employed in the retail meat, service counter/butcher block, and service fish departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Non-Food Unit:

> All employees within the jurisdiction of United Food & Commercial Workers Union Local 555, covered by the wage schedules and classifications listed herein (general sales, store helper clerks, salvage, pharmacy tech A, lead clerks, PICs), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

4. The units set forth above, and each of them, are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct on October 15, 2009, at its Hillsboro, Oregon store at a time when the parties' collective-bargaining agreements allowed union agents to visit the Respondent's represented stores during business hours and talk to represented store employees on the store floor for a reasonable period under reasonable circumstances:

a. Directed union-represented employees not to speak to union representatives on the store floor;

b. Told union-representatives not to talk to union-represented employees on the store floor;

c. Told union representative they must go to the employee breakroom in order to speak with represented employees;

d. Disparaged the Union in the presence of employees by stating variously that union representation was unnecessary and outdated, that the Union and its representatives were stupid, stealing employees dues monies, and otherwise without value or worth;

e. Threatened to have union representatives arrested or removed from the store because they would not restrict their conversations with represented employees to the store employee breakroom;

f. Instructed the Respondent's security officer to contact the police to have the union representatives arrested or removed from the store because they would not restrict their contract with represented employees to the store employee breakroom;

g. Caused the arrest of Union Representatives Reed, Marshall, and Clay because they refused to leave, or were not sufficiently rapid in attempting to leave, the Respondent's store and parking lot;

h. On and after October 15, 2009, caused the criminal prosecution of the arrested union representatives because they re-

fused to leave, or were not sufficiently rapid in attempting to leave, the Respondent's store and parking lot.

6. Respondent violated Section 8(a)(5) and (1) of the Act in limiting the union agents' rights to contact represented store employees within its Hillsboro, Oregon facility on October 15, 2009, in a manner inconsistent with the parties' past practice, unilaterally changing the terms and conditions of union-represented employees within the store without notifying the Union, bargaining with the Union respecting the change, or obtaining the Union's permission.

7. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist therefrom and post remedial Board notices addressing the violations found. The language on the Board notices will conform to the Board's decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), which reiterates the simple logic of the proposition that remedial notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found.

The notice will be directed to be posted in each and all the Respondent's stores in which employees in the bargaining units cited herein are regularly employed. The controversy while occurring at a single store was treated by all concerned as having far wider—contract wide—implications. The question of union agent access is governed by the uniform contract language at those facilities. Further both the Union and the Respondent viewed the incident as having application to all stores under the contracts. And, importantly, the Respondent in communications with employees at all the represented facilities after the event, described the arrests as resulting from union agent disregard of applicable contract language and practice, as discussed in part supra, which language and practices were described as applicable to all the unit-represented stores.

Further as the Board held in the recent case of *J. Picini Flooring*, 356 NLRB 11 (2010), notices should also be posted electronically, on the Respondent's intranet or internet site, if the Respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by email if the Respondent customarily uses email to communicate with its employees, and by any other electronic means of communication so used by the Respondent.

The Respondent shall be ordered to make the Union or the union representatives, as the case may be, whole for any and all legal, representational and related costs arising from the Reed, Marshall, and Clay arrests and subsequent related proceedings and the Respondent will be ordered to notify the appropriate law enforcement and court authorities of the illegality of the arrests and to seek the expungement of associated records. *Roger D. Hughes Drywall*, 344 NLRB 413 (2005); *Schear's Food Center*, 318 NLRB 261, 267 (1995); *K Mart Corp.,* 313 NLRB 50, 58 (1993); *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977), affd. 568 F.2d 1 (6th Cir. 1977). See also *Petrochem Insulation, Inc*., 240 F.3d 26, 35 (D.C. Cir. 2001).

The General Counsel seeks compound interest on the sums due herein. The Board has recently changed its view respecting interest calculation as set forth in *Kentucky River Medical Center*, 356 NLRB 6 (2010), in which it announced that it will routinely order compound interest calculated on a daily basis on backpay and other monetary awards in backpay cases and that this standard will be applied retroactively. The Board's interest calculations standards have without exception been applied uniformly in a standard manner respecting the means or formulas for calculation of all monetary remedies. I conclude that the Board's new standard should apply herein. I shall therefore grant the General Counsel's request and shall direct interest on the make whole sums involved herein be calculated and paid with interest compounded on a daily basis consistent with *Kentucky River Medical Center*, supra.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended[21]

ORDER

The Respondent, Fred Meyers Stores, Inc., Hillsboro, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing union-represented employees not to speak to union representatives on the store floor.

(b) Telling union representatives not to talk to union-represented employees on the store floor.

(c) Telling union representative they must go to the employee breakroom in order to speak with represented employees.

(d) Disparaging the Union in the presence of employees by stating variously that union representation was unnecessary and outdated, that the Union and its representatives were stupid, stealing employees' dues moneys, and were otherwise without value or worth.

(e) Threatening to have union representatives arrested or removed from the store because they would not restrict their conversations with represented employees to the store employee breakroom.

(f) Instructing the Respondent's security officer to contact the police to have the union representatives arrested or removed from the store because they would not restrict their contract with represented employees to the store employee breakroom.

(g) Causing the arrest of union representatives because they refused to leave, or were not sufficiently rapid in attempting to leave, the Respondent's store and parking lot.

(h) On and after October 15, 2009, causing the criminal prosecution of the arrested union representatives because they refused to leave, or were not sufficiently rapid in attempting to leave, the Respondent's store and parking lot.

(i) Limiting the union agents' rights to contact represented store employees in a manner inconsistent with the parties' past

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

practice, thereby unilaterally changing the terms and conditions of union-represented employees in the bargaining units noted above, without notifying the Union, bargaining with the Union respecting the change or obtaining the Union's permission.

(j) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the Union or Union Agents Reed, Marshall, and Clay, as the case may be, whole for any and all legal, representational and related costs arising from the Reed, Marshall, and Clay arrests and subsequent related proceedings, with interest, in the manner described in the remedy section of this decision.

(b) Notify the appropriate law enforcement and court authorities of the illegality of the arrests and to seek the expungement of associated records and within 3 days notify Reed, Marshall, and Clay that this has been done.

(c) Within 14 days after service by the Region, post copies of the attached notice set forth in the Appendix[22] at its union-represented stores which are covered by any of the collective-bargaining agreements covering one or more of the bargaining units cited herein. Copies of the notice, in English and such other languages as the Regional Director determines are necessary and proper to communicate with employees, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where represented employees covered by the cited contracts or in the bargaining units currently covered by the contracts, are employed. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed one or more of the facilities at which the notice was to have been posted, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at the closed facility at any time after October 15, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region or Subregion attesting to the steps that the Respondent has taken to comply.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Under collective-bargaining contracts Fred Meyer has negotiated with the United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union (the Union), respecting bargaining units of our employees described further down on this notice, we have contract clauses and a practice of applying that contract clause which provides that union agents may contact our union-represented store employees in our stores on union business during the employees' working hours in a manner that does not interfere with service to customers nor unreasonably interrupt employees in the performance of the employees' duties.

The Union and the Company had a dispute regarding union agent access to store employees at our Hillsboro, Oregon store on October 15, 2009. After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that in handling that dispute, we violated the National Labor Relations Act and has directed us to post and obey this notice to our union-represented employees and to abide by its terms.

Accordingly, we give our employees the following assurances.

WE WILL NOT direct our union-represented employees not to speak to union representatives on the store floor.

WE WILL NOT tell union representatives visiting our represented stores not to talk to union-represented employees on the store floor.

WE WILL NOT tell union representatives visiting our represented stores they must go to the employee breakroom in order to speak with represented employees.

WE WILL NOT disparage or criticize the Union or the visiting union agents in our stores in the presence of our employees by stating variously that union representation was unnecessary and outdated, that the Union and its representatives were stupid, stealing employees dues monies, and/or were otherwise without value or worth.

WE WILL NOT threaten union representatives visiting our represented stores that we will have them arrested or removed from the store because they would not restrict their conversations with represented employees to the store employee breakroom.

WE WILL NOT instruct our store security officers to contact the police to have the union representatives arrested or removed from the store because the union representatives would not restrict their contract with represented employees to the store employee breakroom.

WE WILL NOT cause the arrest of union representatives, including Union Agents Reed, Marshall, and Clay, because they refused to leave, or were not sufficiently rapid in attempting to leave, our Hillsboro, Oregon store and parking lot.

WE WILL NOT cause the criminal prosecution for trespass of union representatives, including Union Agents Reed, Marshall, and Clay, because they refused to leave, or were not sufficiently rapid in attempting to leave, the Respondent's Hillsboro, Oregon store and parking lot.

WE WILL NOT fail and refuse to bargain collectively with the Union as the exclusive bargaining representative of our employees in the bargaining units of employees described below by denying union agents access to our represented store employees on the store floor in a manner consistent with our contracts' terms and our practice of applying said terms without prior notice to the Union and without affording the Union the opportunity to bargaining with respect to this conduct and the effects of this conduct.

WE WILL NOT in any other like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make the Union or Union Agents Reed, Marshall, and Clay, as the case may be, whole for any and all legal, representational and related costs arising from the Reed, Marshall, and Clay arrests and any and all related, subsequent proceedings, with interest compounded daily on the amounts due.

WE WILL notify the appropriate law enforcement and court authorities of the illegality of the arrests of Reed, Marshall, and Clay on October 15, 2009, and WE WILL seek the expungement of associated official records and, further, WE WILL, within 3 days of our actions, notify the Union and Reed, Marshall, and Clay that this has been done.

The United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union is and has been the exclusive representative of our employees in the following units for purposes of collective bargaining:

The Grocery, Produce, and Delicatessen (Grocery) Unit:

All employees within the jurisdiction of United Food & Commercial Workers' Union Local 555, covered by the wage schedules and classifications listed herein (head clerk/head produce clerk, journey person clerk, apprentices, courtesy clerks, demonstrators, container clerks employed in the grocery, produce and delicatessen departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Combined Checkout (CCK) Unit:

All employees employed in the Respondent's combination food/non-food check stand departments in all present and future combination food/non-food check stand departments in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Retail Meat Unit:

All employees covered by the wage schedules and classifications listed herein (head meat cutter, journeyperson meat cutter, apprentices, journeyperson meat wrapper, lead person, journeypersons employed in the retail meat, service counter/butcher block, and service fish departments), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

The Non-Food Unit:

All employees within the jurisdiction of United Food & Commercial Workers Union Local 555, covered by the wage schedules and classifications listed herein (general sales, store helper clerks, salvage, pharmacy tech A, lead clerks, PICs), for all present and future stores of the Respondent in Multnomah, Washington, Clackamas, Columbia, and Yamhill Counties, Oregon.

FRED MEYER STORES, INC.